Supreme Court, U.S.
FILED
94 480 SEP 14 1994
OFFICE OF THE CLERK

No. 94- .

IN THE
Supreme Court of the United States

October Term, 1994

TIMBERLANE REGIONAL SCHOOL DISTRICT,
PETITIONER,
v.
KEVIN W. MURPHY,
BY AND THROUGH HIS LEGAL GUARDIANS,
KEVIN C. MURPHY AND JANICE MURPHY,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

GERALD M. ZELIN
Counsel of Record
SOULE, LESLIE, ZELIN,
SAYWARD AND LOUGHMAN
220 Main Street
Salem, NH 03079
(603) 898-9776
Counsel for the Petitioner

JOHN F. TEAGUE
Of Counsel
UPTON, SANDERS AND SMITH
10 Centre Street
P.O. Box 1109
Concord, NH 03302-1109

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

151PP

QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412(2)(B), and state law required that the school district offer Kevin appropriate special education *to* age 21. During 1982 and 1983, while Kevin was ages 14 and 15, his parents kept him home from school. In 1989, after Kevin reached age 21, his parents filed for an administrative hearing under the IDEA, seeking two years of "compensatory education" beyond age 21 for educational services missed during 1982 and 1983. The Court of Appeals borrowed a six-year state statute of limitations rather than a four-year state statute of limitations, and found a "unitary violation" which surmounted the six-year statute of limitations.

1. Are the decisions of the Court of Appeals, ruling that the appropriate statute of limitations for IDEA hearings be selected on a case-by-case basis and borrowing the longest possible statute of limitations in this case, consistent with the IDEA and the intent of Congress that IDEA disputes be resolved in a timely manner?

2. May a student who seeks compensatory education under the IDEA, for services missed within and outside the applicable statute of limitations, recover for services missed outside the statute of limitations based on a "unitary violation" theory? If so, what are the standards for finding a unitary violation?

3. What standards govern when determining the appropriate statute of limitations to borrow in cases arising under a federal grant statute enacted pursuant to Congress' Spending Power? Do the principles discussed in *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981), favoring predictability for recipients of federal funds, support strict application of a single, short statute of limitations?

LIST OF ALL PARENT COMPANIES AND SUBSIDIARIES

The Timberlane Regional School District is a municipal corporation organized under the laws of the State of New Hampshire. It does not have any parent companies or subsidiaries. The Respondents are all individuals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF ALL PARENT COMPANIES AND SUBSIDIARIES iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS AND ADMINISRATIVE REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. *The statutory framework* 3

B. *Facts* 4

C. *Proceedings below* 7

REASONS FOR GRANTING PETITION 11

I. THE QUESTIONS PRESENTED ARE IMPORTANT 11

A. *The evolving remedy of compensatory education* 13

B. *Selecting the appropriate statute of limitations* 18

C. *The "unitary violation" issue* 23

D. *Special legal standards should apply when selecting the appropriate statute of limitations to borrow for federal grant laws* 25

II. THE CIRCUITS ARE DIVIDED OVER WHICH STATE STATUTE OF LIMITATIONS TO BORROW IN IDEA CASES 27

Conclusion 29

TABLE OF AUTHORITIES CITED

CASES

Adams Central School District No. 90 v. *Deist*, 214 Neb. 307, 334 N.W.2d 775 (Supreme Ct. of Nebraska, 1983), cert. denied, 464 U.S. 893 (1983) 15

Alexopulos v. *San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987) 21, 28, 28n

Board of Education of Hendrick Hudson School District v. *Rowley*, 458 U.S. 176 (1982) 12, 13, 25, 26

Amann v. *Town of Stow*, 991 F.2d 929 (1st Cir. 1993) 28n

Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 19

Burlington School Committee v. *Massachusetts Department of Education*, 471 U.S. 359 (1985) 13, 15, 16

Burnett v. *Grattan*, 468 U.S. 42 (1984) 19

Burr v. *Ambach*, 863 F.2d 1071 (2d Cir. 1988), vacated and remanded sub nom. *Sobol* v. *Burr*, 492 U.S. 902 (1989), reaffirmed, 888 F.2d 258 (2d Cir. 1989), cert. denied, 494 U.S. 1005 (1990) 16

Department of Education, State of Hawaii v. *Carl D.*, 695 F.2d 1154 (9th Cir. 1983) 28n

Dreher v. *Amphitheater Unified School District*, 22 F.2d 228 (9th Cir. 1994) 28

Garland Independent School District v. *Wilks*, 657 F.Supp. 1163 (N.D. Tex. 1987) 16

Guardians Association v. *Civil Service Commission of New York City*, 463 U.S. 582 (1983) 25

Hall v. *Knott County Board of Education*, 941 F.2d 402 (6th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 982 (1992) 21, 23, 28

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 24

TABLE OF AUTHORITIES (*continued*)

Janzen v. *Knox County Board of Education*, 790 F.2d 484 (6th Cir. 1986) 28

Jefferson County Board of Education v. *Breen*, 853 F.2d 853 (11th Cir. 1988), rehearing denied, 864 F.2d 795 (11th Cir. 1988) 16

Lawson v. *Edwardsburg Public School*, 751 F.Supp. 1257 (W.D. Mich. 1990) 21

Lester H. v. *Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. den., 499 U.S. 923 (1991) 14, 21, 28

McDowell v. *Fort Bend Independent School District*, 737 F.Supp. 386 (S.D. Tex. 1990) 15, 21, 23

Miener v. *State of Missouri*, 800 F.2d 749 (8th Cir. 1986) 16

Murphy v. *Timberlane Regional School District*, 973 F.2d 13 (1st Cir. 1992) 9

Natrona County School District No. 1 v. *McKight*, 764 P.2d 1039 (Supreme Ct. of Wyoming, 1988) 15

Pennhurst State School v. *Halderman*, 451 U.S. 1 (1981) i, 25, 26, 27

Pihl v. *Massachusetts Department of Education*, 9 F.2d 184 (1st Cir. 1993) 15

Rollinsford School District v. *M.*, (N.H. Dept. Ed. 1988) 5n

Sabree v. *United Brotherhood of Carpenters and Joiners Local No. 33*, 921 F.2d 396 (1st Cir. 1990) 24

Scokin v. *Texas*, 723 F.2d 432 (5th Cir. 1984) 28n

Spiegler v. *District of Columbia*, 866 F.2d 461 (D.C. Cir. 1989) 20, 21, 28n

Tokarcik v. *Forest Hills School District*, 665 F.2d 443 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982) 28n

Timms v. *Metropolitan School District of Wabash County*, 722 F.2d 1310 (7th Cir. 1983) 15

TABLE OF AUTHORITIES (*continued*)

Town of Burlington v. *Department of Education, Commonwealth of Massachusetts*, 736 F.2d 773 (1st Cir. 1984), affirmed on other grounds, 471 U.S. 359 (1985) 22

Wilson v. *Garcia*, 471 U.S. 261 (1985) 18, 19, 23, 26

STATUTES AND REGULATIONS

20 U.S.C. § 1400 3
20 U.S.C. § 1401 3, 26
20 U.S.C. § 1407 20
20 U.S.C. § 1411 3, 12, 25
20 U.S.C. § 1412 i, 2, 3, 12, 13, 25, 26
20 U.S.C. § 1413 3, 12, 25
20 U.S.C. § 1414 3, 12, 20
20 U.S.C. § 1415 2, 3, 5n, 7, 9, 17, 20, 22, 26, 28
20 U.S.C. § 1417 20
28 U.S.C. § 1254 2
28 U.S.C. § 1658 21
42 U.S.C. § 1983 17, 23

N.H. Code Admin. R. Ed. 1125.01 2, 5, 5n, 10, 24
N.H. Code Admin. R. Ed. 1127.02 2

N.H. Rev. Stat. Ann. 169 6
N.H. Rev. Stat. Ann. 186 3, 6, 13, 20, 22, 25
N.H. Rev. Stat. Ann. 507 2, 10, 19, 20, 21
N.H. Rev. Stat. Ann. 508 2, 10, 11, 19

34 C.F.R. § 300.504 2, 5n
34 C.F.R. § 300.506 2
34 C.F.R. § 300.510 2
34 C.F.R. § 300.512 2, 20, 22
34 C.F.R. § 300.573 20

MISCELLANEOUS

121 Congressional Record 37,416 (1975) 20

Gartner and Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 Harvard Educational Review 367 (November 1987) 12

U.S. Department of Education, *Fifteenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act* (1993), p. A-50 12

No. 94- .

IN THE
Supreme Court of the United States

October Term, 1994

TIMBERLANE REGIONAL SCHOOL DISTRICT,
PETITIONER,
v.
KEVIN W. MURPHY,
BY AND THROUGH HIS LEGAL GUARDIANS,
KEVIN C. MURPHY AND JANICE MURPHY,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

The Timberlane Regional School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, dated April 28, 1994 (A67), is reported at 22 F.3d 1186, 91 Ed.Law Rep. 62, 20 IDELR 1391. The order of the Court of Appeals denying Timberlane's petition for reconsideration, dated June 16, 1994 (A92), is unreported.

Prior decisions in this case are as follows:

a) The New Hampshire Department of Education hearing officer's decision dated February 27, 1990 (A1) is not reported.

b) The New Hampshire Department of Education hearing officer's ruling on motions for reconsideration dated April 23, 1990 (A10) is not reported.

c) The U.S. District Court's decision dated August 26, 1991 (A17) is reported at 18 IDELR 58.

d) The decision of the Court of Appeals dated August 19, 1992 (A35) is reported at 973 F.2d 13, 77 Ed.Law Rep. 28, 19 IDELR 128.

e) The U.S. District Court's order dated March 16, 1993 (A45) is not reported.

f) The U.S. District Court's order dated May 10, 1993 (A47) is reported at 819 F.Supp. 1127, 82 Ed.Law Rep. 798, 19 IDELR 846.

JURISDICTION

The Court of Appeals rendered judgment on April 28, 1994 and denied Timberlane's petition for rehearing on June 16, 1994. (A91, A92.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS INVOLVED

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1412(2)(B), 1415(a)-(e) (A93).

34 C.F.R. §§ 300.504, 300.506, 300.510(a), and 300.512(a) (A97).

N.H. Rev. Stat. Ann. 186-C:2, I, 186-C:9, 186-C:16, IV, 186-C:17 (A100).

N.H. Rev. Stat. Ann. 507-B:7, 508:1, 508:4 (A101).

N.H. Code Admin. R. Ed. 1125.01, 1127.02(a), (b) (A105).

STATEMENT OF THE CASE

A. *The statutory framework*

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et seq.*[1] The IDEA offers federal financial assistance to every state which agrees to provide a free appropriate public education to all disabled students. 20 U.S.C. §§ 1411-1413. The IDEA requires that participating states offer such services to students ages 3 to 21, unless state law establishes different age limits. 20 U.S.C. § 1412(2)(B).

New Hampshire participates in this federal grant program. The state statute implementing the IDEA requires that school districts offer a free appropriate public education to every disabled student up to age 21 or graduation from high school, whichever occurs first. N.H. Rev. Stat. Ann. 186-C:2, I, 186-C:9.

Both the IDEA and state law require that a school district develop an "individualized education program" (IEP) for each disabled student. This document, developed by school district personnel in consultation with the student's parents, describes the special education services which the district agrees to provide. 20 U.S.C. § 1401(a)(18)(D), (20); N.H. Rev. Stat. Ann. 186-C:2, III, 186-C:7. The school district must review this IEP at least annually. 20 U.S.C. § 1414(a)(5).

The IDEA also requires that participating states establish procedures for parents to appeal school district decisions to an impartial administrative hearing officer, whose decision is appealable to the U.S. District Court. 20 U.S.C. § 1415(b)(2), (d), (e)(2), (4).

---

[1] This statute was originally entitled the Education of the Handicapped Act (EHA), and then the Education for All Handicapped Children Act (EAHCA). It was renamed the Individuals with Disabilities Education Act (IDEA) in 1990.

B. *Facts*

Kevin Murphy was born on July 9, 1968. During a tongue operation at age 2½, he suffered oxygen deprivation and emerged with brain damage. As a result, Kevin suffers from mild mental retardation, spastic paraplegia, visual agnosia (difficulty processing visual stimuli), and tactile agnosia (difficulty processing tactile stimuli). A medical malpractice action ended in a settlement whereby Kevin received $1,026,000 to be placed in trust, with his parents as trustees.

In September 1976, Kevin and his parents moved to Plaistow, New Hampshire, which is within the Timberlane Regional School District. The school district then provided Kevin with special education pursuant to a series of IEPs.

In September 1981, the school district and Kevin's parents agreed to a placement for the 1981-82 school year at Charlotte Avenue School, a public elementary school in Nashua, New Hampshire operated by the Nashua School District. This was a special program for students with visual impairments. Timberlane funded Kevin's tuition and transportation.

On January 2, 1982, Mr. Murphy withdrew Kevin from school.

Mr. Murphy notified the Timberlane Regional School District that the Charlotte Avenue School program was inappropriate, but refused to explain why and thwarted Timberlane's efforts to obtain additional information. For example, Timberlane personnel tried to meet with Mr. Murphy to explore his concerns. He walked out of the February 18, 1982 meeting, after informing everyone that if they discussed his son he would sue them.

On February 9, 1982, Mr. Murphy wrote to the school district, threatening to "bring all of my irrefutable evidence before a jury of my own choosing and in my own time."

In a letter to the school district dated March 24, 1982, the State Department of Education advised Timberlane that, if Mr. and Mrs. Murphy did not return Kevin to school, the school district should commence truancy proceedings pursuant to New Hampshire's compulsory school attendance law.

In May 1982, after Timberlane threatened to initiate truancy proceedings, Mr. and Mrs. Murphy agreed to allow Kevin to attend Pollard School, one of Timberlane's public schools, for the rest of the 1981-82 school year.

In July 1982, Timberlane developed an IEP for Kevin for the 1982-83 school year. The school district offered special education at a new program at Pollard School, with a new teacher who had just been hired for Kevin and one other student. The school district also offered to commission an independent evaluation at a hospital and to review the IEP after that evaluation was completed.

Mr. Murphy neither signed nor appealed the 1982-83 IEP. He also withheld consent for a hospital evaluation. On October 1, 1982, Mr. Murphy allowed Dr. Lewis Stieglitz to evaluate Kevin's vision at Timberlane's expense, but then prohibited Dr. Stieglitz from disclosing any report.

The Murphys then kept Kevin home for the entire 1982-83 school year.

The New Hampshire Board of Education's regulations provided that, when a school district offers an IEP and the student's parents neither sign nor appeal it, the school district "shall" request an administrative hearing "[i]f the Local Education Agency feels its action or decision should, in the best interests of the student, be implemented."[2] N.H. Code Admin. R. Ed. 1125.01(b)(3)-b (A108). However, the state special education

[2] This state regulation, first adopted by the New Hampshire Board of Education in August 1981, exceeded the requirements of federal law. The IDEA merely requires that school district give parents *notice* of a decision, and places the burden on parents to request an administrative hearing if they disagree. 20 U.S.C. § 1415(b)(1)(C), (E), (2). The U.S. Department of Education regulation in effect at the time required parental *consent* or permission from a hearing officer for an *initial* evaluation or *initial* IEP, but only *notice* to the parents before implementing a subsequent evaluation or subsequent IEP. This regulation also provided that, "Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child." C.F.R. § 300.504 (A97). Furthermore, the federal regulations did not state that a school district "shall" request an administrative hearing. They provided that a school district "may" request an administrative hearing when parents withhold consent for an initial evaluation or initial IEP. 34 C.F.R. § 300.504(c)(2)(i) (A98). In 1988, a state hearing officer ruled that Ed. 1125.01(b)(3)-b was invalid because it violated federal law. *Rollinsford School District* v. *M.*, (N.H. Dept. Ed. 1988).

statute provided that only courts, not administrative hearing officers, may compel a child to attend school. N.H. Rev. Stat. Ann. 186-C:17 (A101).

On November 19, 1982, the Timberlane Regional School District filed a juvenile petition in Plaistow District Court, alleging that Kevin was a "child in need of services" under N.H. Rev. Stat. Ann. 169-D:2, IV (a) because he was truant in violation of the state compulsory school attendance statute. The school district requested that the court order Kevin to attend school, allow the school district to evaluate Kevin, and order the Murphys to disclose any evaluations which they had.

This truancy action was derailed when the Murphys' lawyer initiated an *ex parte* conference with the juvenile court judge. That attorney (who is not the Murphys' counsel at this time) persuaded the court to hold the case in abeyance to allow further negotiations over Kevin's IEP.

In February 1983, the school district appointed George Wright, who was not a school district employee, to try to mediate a settlement. In August 1983, the school district went a step further, authorizing Mr. Wright to act as the school district's agent by negotiating an IEP with the Murphys and binding the school district to that IEP.

In October 1983, Mr. Wright and Mr. Murphy agreed to a diagnostic placement for Kevin at Pinkerton Academy, a high school in Derry, New Hampshire. Kevin attended that program during October and November. In December 1983, Mr. Wright and the Murphys agreed to an IEP placing Kevin in a special education program at Pinkerton Academy, the Get Set program. Kevin attended that program, at Timberlane's expense, through June 1989. The Pinkerton Academy program cost Timberlane approximately $25,000 annually for tuition and transportation.

In November 1988, Mr. Murphy approached Timberlane's Superintendent of Schools, inquiring whether the school district would provide special education beyond Kevin's twenty-first birthday, which was July 9, 1989. On January 5, 1989, the Timberlane School Board denied Mr. Murphy's request for special education beyond Kevin's twenty-first birthday. The school district promptly notified Mr. Murphy of that decision.

On June 19, 1989, Mr. Wright presented Mr. Murphy with a form discharging Kevin from special education effective July 9, 1989. The form notified Mr. Murphy of his right under state law to appeal the decision within 14 days. Mr. Murphy did not file an appeal within 14 days.

C. *Proceedings below*

On August 20, 1989, Mr. Murphy requested a State Department of Education hearing pursuant to 20 U.S.C. § 1415(b)(2). He asked for two years of compensatory education beyond Kevin's twenty-first birthday, to make up for the time during 1982 and 1983 that he kept Kevin home from school. He also requested that the school district pay for Kevin to attend Pinkerton Academy during the pendency of the hearing in accordance with § 20 U.S.C. 1415(e)(3), which requires that a "child . . . remain in the then current educational placement" while administrative and judicial proceedings are pending.

The school district moved to dismiss on a variety of grounds, including the statute of limitations, laches, and failure to state a cause of action. The parties treated this as a motion for summary judgment by filing numerous exhibits with the hearing officer, including school district records, affidavits, correspondence between the parties, and transcripts of meetings.

On February 27, 1990, the hearing officer denied the school district's motion to dismiss. However, the hearing officer also found that "[d]uring the 1981 through 1983 period, the record reveals that the parent was frequently uncooperative and less than forthcoming concerning legitimate district requests for input." Citing this inequitable conduct, the hearing officer ruled that Timberlane was not obligated to maintain Kevin's placement at Pinkerton Academy while administrative and judicial proceedings were pending. (A1, A8-A9.)

On April 23, 1990, the hearing officer granted Timberlane's motion for reconsideration and dismissed the case based on laches.

> "Having determined that the parent's actions were unreasonable, the second prong of the test is whether they

> caused prejudice to the school district. Because the student is now 21, the state will not reimburse the district for any compensatory education provided to the student. . . . Furthermore, as an experienced hearing officer, the undersigned has repeatedly seen the difficulties involved in trying to reconstruct both the facts and the circumstances surrounding long-ago events which are the subject of a due process hearing. The district has asserted that it may be unable to compel attendance by various important witnesses from the 1981-83 period. Even if it can find these witnesses, memories of that period will be highly unreliable. In addition, the evidence is now stale and likely to engender contradictions which, like the proverbial Gordian knot, may be impossible to untangle, especially in a case like this which entails such animosity. Therefore, the undersigned concludes that the district has been prejudiced by the parent's failure to timely initiate an appeal concerning the appropriateness of the programs offered by the district in the period between December, 1981 and October, 1983."

(A10, A14.)

The hearing officer also concluded that Timberlane's choice to file a truancy petition in juvenile court "was the appropriate manner to seek to compel the parents of the student to return him to school," because N.H. Rev. Stat. Ann. 186-C:17 would have prevented a hearing officer from ordering Kevin to attend school. (A11.)

Finally, the hearing officer found that Mr. Murphy had acted uncooperatively when Kevin was truant.

> "A question which has plagued the undersigned in this matter is why did the parent fail to file a due process appeal during the long period when he refused to allow the student to attend school, or to agree to any program offered by the district? The record as it currently stands shows only an adamant refusal by the parent involved to participate in a meaningful way in the district's attempts to fashion a program acceptable to him. . . . Availing him-

> self of a due process appeal would have provided a way to force the district to provide a program acceptable to the parent. Of course, it would also have forced him to present evidence as to what that program should entail, something he refused to provide to the school district during the long process of negotiations over an IEP."

(A13.)

The Murphys appealed the hearing officer's decision to the U.S. District Court for the District of New Hampshire pursuant to 20 U.S.C. § 1415(e)(2) and (4). Timberlane moved for summary judgment, again raising the statute of limitations, laches, and failure to state a cause of action for compensatory education.

On August 26, 1991, the U.S. District Court granted Timberlane's motion for summary judgment and dismissed the Murphys' appeal. (A17.) The court explicitly declined to address the statute of limitations issue. (A32, note 9.) Instead, the court concurred with the hearing officer's conclusion that the case was barred by laches. Referring to the "voluminous record," the District Court also agreed with the hearing officer's finding that Mr. Murphy had been uncooperative. (A30).

On August 19, 1992, the Court of Appeals reversed the District Court's judgment and remanded the case to the District Court for reconsideration on the laches issue. *Murphy* v. *Timberlane Regional School District*, 973 F.2d 13 (1st Cir. 1992) (A35).[3]

On January 28, 1993, the U.S. District Court held an evidentiary hearing on the laches issue.

On February 16, 1993, Timberlane filed a motion for summary judgment to dismiss the Murphys' compensatory education claim as untimely under the statute of limitations. The school district argued that, since the IDEA contains no statute

---

[3] When assessing the evidence of prejudice, the Court of Appeals assumed that any compensatory education would necessarily occur after age 21. Therefore, the court concluded, the school district could not have received state funding for Kevin's compensatory education regardless of when the Murphys requested such relief. This reasoning ignored the possibility of providing "more than appropriate" compensatory education under age 21, discussed later in this petition.

of limitations for requesting an administrative hearing, the court should borrow N.H. Rev. Stat. Ann. 507-B:7, which establishes a four-year statute of limitations for actions against school districts. In the alternative, Timberlane argued, even if the court borrowed N.H. Rev. Stat. Ann. 508:4, which established a six-year statute of limitations for residual "personal actions," only a small portion of the Murphys' claim was timely. Specifically, since Kevin was out of school from January 1982 to January 1984, but the Murphys did not request an administrative hearing until August 20, 1989, a four-year statute of limitations would bar their entire claim, while a six-year statute of limitations would permit them to recover only for services missed after August 20, 1983.

On March 16, 1993, before ruling on laches and the statute of limitations, the court directed the parties to file cross-motions for summary judgment on the merits within 10 days. (A45.)[4]

On May 10, 1993, the U.S. District Court granted the Murphys' motion for summary judgment and awarded Kevin two years of compensatory education. *Murphy* v. *Timberlane Regional School District*, 819 F.Supp. 1127 (D.N.H. 1993) (A47). The court concluded that the Murphys' case was not barred by laches and that no statute of limitations applies.

In essence, the District Court held Timberlane automatically liable for compensatory education based entirely on the school district's failure to request an administrative hearing while Kevin was absent from school. The court reasoned that N.H. Code Admin. R. Ed. 1125.01(b)(3)-b implemented the IDEA, and that Timberlane's violation of that state administrative regulation thereby amounted to a violation of the IDEA.

It is worth noting what the District Court did not find. The court did not imply that the programs which Timberlane offered when Kevin was absent were *educationally* deficient. The court glossed over the Murphys' own failure to request a hearing while Kevin was absent from school. The court did not find that Timberlane's failure to initiate a hearing was a proximate cause for Kevin's truancy, i.e., that the Murphys would have

[4] The court later granted a motion to extend this deadline to April 9, 1993.

returned Kevin to school had the school district requested an administrative hearing.

On April 28, 1994, the Court of Appeals affirmed the District Court's award of two years of compensatory education.

The Court of Appeals disagreed with the District Court's conclusion that no statute of limitations governed. After implying that the statute of limitations for requesting an administrative hearing under the IDEA should be selected on a "case-by-case basis," the Court of Appeals borrowed the six-year statute of limitations, N.H. Rev. Stat. Ann. 508:4.

This six-year statute of limitations, strictly applied, saved only a portion of the Murphys' claim. Most of the period when Kevin missed school was more than six years prior to the Murphys' request for an administrative hearing.

The Court of Appeals then concluded that Timberlane was guilty of a "unitary violation" which surmounted the statute of limitations. Since a portion of the Murphys' claim fell within the six-year statute of limitations, their entire claim was timely.[5]

REASONS FOR GRANTING PETITION

I. The Questions Presented Are Important.

This case arises at the intersection of two important and evolving issues regarding special education law. First, does the Individuals with Disabilities Education Act (IDEA) create a cause of action for compensatory education beyond age 21, when the statute explicitly limits eligibility to students under age 21? Second, what is the statute of limitations for claims arising under the IDEA?

These two issues are closely linked, because selecting a statute of limitations shapes the contours of compensatory education. It is one thing for a student to seek compensatory educa-

[5] The Court of Appeals also speculated that perhaps Kevin's claim did not accrue until he returned to school in October 1983 or January 1984, but apparently did not rely upon that theory. Citing case law which suggested that Kevin's claim accrued when the Murphys first realized Kevin's injury, which was while he was absent from school, the Court of Appeals apparently relied upon the unitary violation theory.

tion based upon recent events. Kevin's claim, in contrast, tests the outer limits of the remedy. He seeks compensatory education beyond age 21 based upon events which occurred in the distant past, and he waited until age 21 before initiating legal proceedings.

The issues in this case are important for public schools and students alike. Ten percent of all school age children qualify as disabled under the IDEA. *E.g.*, U.S. Department of Education, *Fifteenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act* (1993), p. A-50. Any student who has ever received services under the IDEA may claim that the school district failed to provide enough. This is in addition to students who never received services under the IDEA and later claim that they should have.

As the Murphys' case demonstrates, the financial consequences can be enormous. The IDEA is a federal grant statute, applicable only to those states which elect to participate. 20 U.S.C. §§ 1411-1413. *See Board of Education of Hendrick Hudson School District* v. *Rowley*, 458 U.S. 176, 179-184 (1982). As an inducement, the IDEA promises participating states annually, for each disabled child, an amount equal to 40 percent of the national average per pupil cost. 20 U.S.C. § 1411(a)(1)(B)(v). All 50 states agreed to participate, but Congress never appropriated more than a small fraction of the promised amount. *E.g.*, Gartner and Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 Harvard Educational Review 367, 371 (November 1987). Timberlane received approximately $300 each year from the federal government for Kevin under 20 U.S.C. § 1411. His special education programs cost the school district approximately $25,000 annually. Now, the Murphys are seeking two years of special education beyond age 21 at a residential facility in Florida which costs over $100,000 annually.

Timberlane is not challenging the availability of compensatory education in an appropriate case, when the student files a timely claim.

Rather, Timberlane argues that compensatory education should be an extraordinary remedy, a last resort rather than a

first resort, and therefore a reasonably short statute of limitations should govern.

A. *The evolving remedy of compensatory education*

The IDEA and New Hampshire law require that school districts offer a "free appropriate public education" to every disabled student between the ages of 3 and 21, unless the student has received a high school diploma. 20 U.S.C. § 1412(2)(B); N.H. Rev. Stat. Ann. 186-C:2, I, 186-C:9.

This court has held that the IDEA requires "an" appropriate education, not the "most appropriate" one. *Rowley*, 458 U.S. 176. An IEP is appropriate if it was developed in compliance with procedures established by the statute and is reasonably calculated to confer "some" educational benefits. *Id.*

In most IDEA cases, the parents appeal an IEP or placement which the school district recently offered, claiming that it is inappropriate. They seek an order vacating the IEP offered by the school district and directing the district to prospectively implement an appropriate one. *E.g.*, *Rowley*. In some cases, parents enroll their child at private school, allege that the public school program is inappropriate, and demand tuition reimbursement. *E.g.*, *Burlington School Committee* v. *Massachusetts Department of Education*, 471 U.S. 359 (1985).

In recent years, an increasing percentage of IDEA cases have sought another type of relief, "compensatory education." Generally speaking, compensatory education consists of prospective educational services beyond what is ordinarily required by the IDEA, and is designed to compensate the student for inappropriate services in the past. In some compensatory education cases, the student seeks the "most appropriate" program, in the form of extraordinarily intensive or expensive services under age 21. More frequently, the student seeks "an appropriate" education beyond age 21, the statutory age limit. Students seeking compensatory education beyond age 21 sometimes request a hearing while under age 21, shortly after suffering the inappropriate services which gave rise to their claim. *E.g.*,

Lester H. v. *Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. den., 499 U.S. 923 (1991). In some cases, like the Murphys', the family waits until age 21 before even requesting an administrative hearing.

Many of the early compensatory education cases involved extreme facts, such as children who were never offered any education whatsoever. Now, even ordinary special education cases often include, in addition to a request for a new IEP or for reimbursement, a request for compensatory education. Every time a school district identifies a child as disabled or changes the IEP, parents may argue that the school district should have done so earlier. In some cases, the student seeks compensatory education for inappropriate services received in the recent past. In some cases, the student seeks compensatory education for allegedly inappropriate services received long ago, or for years of inappropriate services stretching from the recent past to the distant past.

Compensatory education hearings are usually protracted and expensive.

A conventional special education hearing, challenging the student's current IEP, looks toward the future; it requires that the hearing officer predict what sort of educational program is necessary to confer educational benefits. Evidence regarding past events is relevant only insofar as it assists in making those predictions; when determining what will work in the future, it helps to know what sort of programs the child received in the *recent* past and how the child performed in those programs.

A compensatory education hearing, in contrast, focuses on the past. It requires that the hearing officer make *ex post facto* determinations concerning whether the child received inappropriate programming, when, what would have been appropriate, and who was at fault. That necessitates much more detailed and subtle evidence.

If the student claims that the inappropriate services were furnished many years earlier, it is extremely difficult to reconstruct the relevant evidence. A student may have had several teachers each year; one or more teachers may have moved; teachers rarely keep detailed records, such as student work

samples or grade books, more than a year; and a teacher who has dozens of students each year rarely recalls much about how a student did two or three years ago. It takes school districts and their attorneys many hours to identify all the teachers a child had in the past, locate those teachers, interview them, exhume old records from school files and teachers' personal files, and review those records with the teachers to refresh their memories.

Many courts have ruled that the IDEA does not allow courts or administrative hearing officers to award compensatory education beyond age 21, and that students who have reached age 21 lack legal standing to pursue a claim under the IDEA. *E.g.*, *McDowell* v. *Fort Bend Independent School District*, 737 F.Supp. 386 (S.D. Tex. 1990); *Natrona County School District No. 1* v. *McKnight*, 764 P.2d 1039 (Supreme Ct. of Wyoming, 1988); *Adams Central School District No. 90* v. *Deist*, 214 Neb. 307, 334 N.W.2d 775, 786 (Supreme Ct. of Nebraska, 1983), cert. denied, 464 U.S. 893 (1983). *See Timms* v. *Metropolitan School District of Wabash County*, 722 F.2d 1310, 1314-15 (7th Cir. 1983) (unable to decide whether compensatory education is available under the IDEA).

Since *Burlington School Committee* v. *Massachusetts Department of Education*, 471 U.S. 359 (1985), the courts have been somewhat more inclined to allow compensatory education beyond age 21 for violations of the IDEA. That remedy has now been approved by the First, Second, Third, Sixth, Eighth, and Eleventh Circuits. *Pihl* v. *Massachusetts Department of Education*, 9 F.3d 184, 188 (1st Cir. 1993) and cases cited therein. Some have also held that students over age 21 have legal standing. *E.g.*, *Pihl*, 9 F.3d at 186-90.

In *Burlington*, the Supreme Court held that parents could obtain reimbursement from school districts for private school costs, if the school district failed to offer an appropriate special education program under the IDEA. The court distinguished reimbursement from money damages. *Id.*, 471 U.S. at 370, 374. "Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Id.*, 471 U.S. at 370-371.

Post-*Burlington* cases draw an analogy between reimbursement and compensatory education. Reimbursement allows affluent parents to respond to an inappropriate IEP by unilaterally enrolling their child at a private school, "fronting the costs," and later seeking restitution. Compensatory education allows children of less affluent parents to obtain after age 21 services which the school district should have provided when the student was younger. *E.g.*, *Miener* v. *State of Missouri*, 800 F.2d 749, 753 (8th Cir. 1986).

However, *Burlington* does not invite courts to reach back and award relief for events which occurred in the distant past. The parents in *Burlington* apparently sought reimbursement for private school costs which accrued while their appeal from an IEP was pending. The court reasoned that reimbursement should be permitted because an IEP appeal may take years to complete if one party seeks judicial review of the hearing officer's decision. *Burlington*, 471 U.S. at 370. Some lower courts have concluded that *Burlington* allows reimbursement only for costs which accrued while administrative or judicial proceedings were pending. *E.g.*, *Garland Independent School District* v. *Wilks*, 657 F.Supp. 1163, 1167-68 (N.D. Tex. 1987).

Similarly, many of the leading compensatory education cases award services beyond age 21 to compensate for appropriate services which the school district failed to provide in the recent past, while legal proceedings were pending. *E.g.*, *Burr* v. *Ambach*, 863 F.2d 1071, 1073-74, 1078 (2d Cir. 1988), vacated and remanded sub nom. *Sobol* v. *Burr*, 492 U.S. 902 (1989), reaffirmed, 888 F.2d 258 (2d Cir. 1989), cert. denied, 494 U.S. 1005 (1990); *Jefferson County Board of Education* v. *Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988), rehearing denied, 864 F.2d 795 (11th Cir. 1988). "Otherwise, school districts simply could stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations." *Pihl* v. *Massachusetts Department of Education*, 9 F.3d at 189.

The *Burlington* analogy breaks down in Kevin's case. Mr. and Mrs. Murphy kept Kevin home from school during 1982

and 1983. During that time, the school district offered special education, and there has been no finding that the programs offered by the school district were educationally deficient. They waited until 1989, after Kevin reached age 21, before requesting an administrative hearing. They sought compensatory education beyond age 21 as a remedy for services which Kevin missed six and seven years earlier.

Because of this delay, it is now difficult to craft an award of compensatory education which belatedly requires that the school district pay for what it should have borne in the first instance. From January 1984 when Kevin returned to school until June 1989 when he reached age 21, he attended a day program at Pinkerton Academy, which his parents agreed was appropriate. Pinkerton Academy cost Timberlane approximately $25,000 annually. Since few schools offer special education beyond age 21, the Murphys requested that Kevin receive his compensatory education at a residential facility which charges over $100,000 annually. There is no evidence that Timberlane should have funded that sort of program while Kevin was absent from school.

A stale claim for compensatory education is alien to the IDEA. Unlike statutes (such as 42 U.S.C. § 1983) which were enacted solely for the purpose of creating remedies for injuries, the IDEA was enacted to create a service delivery system. The remedies are secondary. Moreover, the preferred remedy is to amend a student's IEP prospectively and quickly, so that he receives inappropriate services for as short a time as possible and appropriate services while still under age 21. Compensatory education and reimbursement should be ancillary to a timely IEP appeal.

Congress never contemplated that administrative hearings under 20 U.S.C. § 1415, which are less formal than court hearings, would be converted into archaeological digs or educational malpractice trials, sorting blame for events which occurred years ago, with huge sums at stake because of the passage of time.

In conclusion, the remedy of compensatory education requires some reasonable constraints. The statutes clearly limit eligibility to students under age 21. In exceptional circumstances, when no other remedy is available, justice may require

that the court allow standing to a student over age 21 or that the court award compensatory education beyond age 21. However, given the age limits in the statute, such relief should be extraordinary. The court should not extend legal standing to students over age 21 who could have, but did not, seek relief while they were under age 21. The court should not allow claims for compensatory education based upon events in the distant past. The statute of limitations is one tool.

B. *Selecting the appropriate statute of limitations*

The statute of limitations issue is important in its own right, aside from its linkage to compensatory education.

The IDEA contains no statute of limitations for either requesting an administrative hearing or for seeking judicial review. When this case arose, New Hampshire's special education law contained no statute of limitations, either. Most states still have not enacted a statute of limitations for special education cases.

This does not mean that no statute of limitations applies.

> "A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' . . . Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten."

Wilson v. *Garcia*, 471 U.S. 261, 271 (1985) (citations omitted).

When a federal law creates a cause of action but includes no statute of limitations, "the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson*, 471 U.S. at 266-67.

The court must "borrow" the state statute of limitations which is "most appropriate" or which governs the "most analo-

gous" state law cause of action. *Wilson*, 471 U.S. at 268; *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980).

In the instant case, the Court of Appeals borrowed New Hampshire's residual six-year statute of limitations for personal actions not governed by any other law, N.H. Rev. Stat. Ann. 508:1, 508:4, rather than the four-year state statute of limitations which governs actions against school districts for bodily injury, personal injury, or property damage, N.H. Rev. Stat. Ann. 507-B:7. The Court of Appeals implied that the applicable statute of limitations for requesting an administrative hearing under the IDEA must be selected on a "case-by-case basis."

The Court of Appeals' decisions — selecting the statute of limitations on a case-by-case basis, and selecting the longest possible statute of limitations for this case — are important and incorrect.

When deciding which statute of limitations is most appropriate or analogous, courts must weigh the substantive policies underlying the federal law, *Wilson*, 471 U.S. at 270, the parties' interest in repose, *id.* at 271, and the "practicalities of litigation." *Burnett* v. *Grattan*, 468 U.S. 42, 50 (1984).

There is little need to tarry over which statute, N.H. Rev. Stat. Ann. 507-B:7 or N.H. Rev. Stat. Ann. 508:4, encompasses state-law claims most analogous to IDEA claims. Neither one is a perfect fit. N.H. Rev. Stat. Ann. 507-B:7 at least applies to school districts, which along with states are the only possible defendants in IDEA cases. The First Circuit observed that N.H. Rev. Stat. Ann. 508:4 is the correct statute to borrow for civil rights claims, citing *Wilson* v. *Garcia*. However, the IDEA is not a civil rights statute; it is a federal grant statute, applicable only to states which elect to participate.

When determining which state statute is more analogous, the primary issue is which period of time — four years or six years — is more appropriate for claims arising under the IDEA.

The policies underlying the IDEA mandate selection of the shortest possible statute of limitations. The legislative history of the statute includes the following remarks by Senator Williams, one of the law's sponsors:

> [I]t is expected that all hearings and reviews conducted pursuant to these provisions will be *commenced* and *dis-*

> *posed of* as quickly as practicable consistent with a fair consideration of the issues involved.

121 Congressional Record 37,416 (1975) (emphasis added). The Court of Appeals did not mention that legislative history.

The U.S. Department of Education's regulations implementing the IDEA reflect that legislative policy by placing administrative hearings on a fast track. Once parents request an administrative hearing, the hearing process shall ordinarily be completed within 45 days. 34 C.F.R. § 300.512(a) (A99). These rules were authorized and approved by Congress. 20 U.S.C. §§ 1407 (b), 1417(b).

It would be anomalous to allow parents six years to request a hearing which must be completed within 45 days.

While an administrative hearing or judicial review is pending, the child shall remain in the "then current educational placement." 20 U.S.C. § 1415(e)(3). Obviously, the law was not intended to allow parents to freeze a child's current placement by requesting a hearing concerning events which occurred years ago.

The IDEA requires that school districts meet with parents to review a student's IEP at least once annually. 20 U.S.C. § 1414(a)(5). New Hampshire law provides that no IEP may last more than one year. N.H. Admin. of Rules Ed. 1109.08(a). There is little utility in conducting a hearing years afterwards, to adjudicate the appropriateness of an IEP which has already expired. On the other hand, if parents allow the statute of limitations to expire before appealing one year's IEP, they do not forfeit their right to appeal the next year's IEP. *See Spiegler v. District of Columbia*, 866 F.2d 461, 468 (D.C.Cir. 1989).

The U.S. Department of Education's IDEA regulations require that school districts honor a parent's request to destroy a disabled child's records which are "no longer needed to provide educational services to the child." 34 C.F.R. § 300.573. This regulation never contemplated that a school district might need to preserve records after a student moves from the district or graduates, to defend against a claim which the student might file years later.

The courts have agreed that the policies underlying the IDEA support a short statute of limitations. *E.g.*, *Spiegler* v. *District of Columbia Board of Education*, 866 F.2d at 466-67. They have also agreed that these policies apply with particular force to compensatory education claims. *Alexopulos* v. *San Francisco Unified School District*, 817 F.2d 551, 556 (9th Cir. 1987). *See Hall* v. *Knott County Board of Education*, 941 F.2d 402, 408 (6th Cir. 1991), cert. denied, — U.S. —, 112 S.Ct. 982 (1992); *Lester H.* v. *Gilhool*, 916 F.2d 865, 868-69 (3rd Cir. 1990), cert. denied, 499 U.S. 923 (1991); *McDowell* v. *Fort Bend Independent School District*, 737 F.Supp. 386 (S.D. Tex. 1990). In *Lawson* v. *Edwardsburg Public School*, 751 F.Supp. 1257 (W.D. Mich. 1990), the court concluded that a general state statute of limitations which allowed six years for filing claims conflicted with the policies underlying the IDEA. The court borrowed a statute similar to N.H. Rev. Stat. Ann. 507-B:7 which allowed three years to file claims against the state.

Congress and the New Hampshire legislature have belatedly spoken on the subject, by enacting short statutes of limitations after this case arose. Although those statutes do not govern in the Murphy's case, they indicate that Congress and the state legislature support a single, relatively short statute of limitations.

The Judicial Improvements Act of 1990, 28 U.S.C. § 1658, establishes a four-year statute of limitations for civil actions to enforce any federal law enacted since 1990 which lacks its own deadline. That four-year limitation is identical to the period in N.H. Rev. Stat. Ann. 507-B:7, the state statute which Timberlane asked the court to borrow. The Judicial Improvements Act does not apply to the IDEA, which was enacted before 1990. However, it demonstrates what Congress feels is a reasonable statute of limitations.

N.H. Rev. Stat. Ann. 186-C:16-b (1993 supp.), enacted in 1992, applies exclusively to special education cases. It establishes the following deadlines: two years for requesting an administrative hearing; and 120 days for seeking judicial review of the hearing officer's decision. The statute contains one exception: it allows only 90 days for parents to request an

administrative hearing seeking reimbursement for private school costs arising from a unilateral placement.[6]

N.H. R.S.A. 186-C:16-b does not apply in this case, because it was enacted after the Murphys' cause of action accrued. However, it reflects the state legislature's judgment regarding a reasonable time limitation for special education cases.

The "practicalities of litigation" similarly support borrowing a short statute of limitations.

Unlike most lawsuits, IDEA cases begin with an administrative hearing, which ordinarily must be completed within 45 days. 34 C.F.R. § 300.512(a). Judicial review is based primarily upon the administrative record. 20 U.S.C. § 1415(e)(2). A reviewing court must give "due weight" to that administrative record. *Rowley*, 458 U.S. at 206. All available evidence should be introduced at the administrative hearing, so that the state hearing officer can apply his expertise and make policy determinations on behalf of the state. *Town of Burlington* v. *Department of Education, Commonwealth of Massachusetts*, 736 F.2d 773, 790-93 (1st Cir. 1984), affirmed on other grounds, 471 U.S. 359 (1985).

Therefore, when deciding which statute of limitations to borrow for IDEA cases, a court must look at the practicalities of litigation at the administrative hearing level. In this case, the Court of Appeals virtually ignored the administrative hearing and focused on practicalities at the District Court level. The Court of Appeals observed that, although witnesses had moved, they could be deposed or subpoenaed across state lines. Those tools are not available at the administrative hearing level. Even if they were available, there would be little time to use them, given the requirement that hearings be completed within 45 days.

The Court of Appeals' decision to select the appropriate statute of limitations on a "case-by-case" basis was similarly

---

[6] According to the legislative history, parents might need to live with an IEP or placement for up to two years before deciding whether it is appropriate, but parents who unilaterally place their child at a private school know immediately that they disagree with the school district's program. Similarly, in Kevin's case, the Murphys knew from the outset that they disagreed with the progreams offered by Timberlane; they did not unilaterally place Kevin elsewhere, but they removed him from school.

flawed. In *Wilson* v. *Garcia*, the Supreme Court condemned that technique when borrowing a state statute of limitations for claims arising under the civil rights act, 42 U.S.C. § 1983. The court observed that a "case-by-case" approach "inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983." *Wilson*, 471 U.S. at 272. The same observations apply to the IDEA. Parties and hearing officers need a "bright line test" for determining the timeliness of a request for an administrative hearing.

C. *The "unitary violation" issue*

The six-year statute of limitations which the Court of Appeals borrowed, by itself, would have allowed Kevin to seek only a few months of compensatory education, for the period August 20, 1983 to January 1984. This is because, although Kevin was out of school most of the time from January 1982 to January 1984, the Murphys did not request an administrative hearing until August 20, 1989.

The Court of Appeals skirted that obstacle by ruling that Timberlane's failure to request an administrative hearing during the two years Kevin was out of school amounted to a "unitary violation."[7]

The Court of Appeals' decision finding a "unitary violation" is important, for it allows a party to surmount whatever statute of limitations the court borrows. It opens the door to students filing claims during grade twelve, seeking eleven years of compensatory education, based upon the argument that the school district continually failed to provide an appropriate program since first grade.

---

[7] The Court of Appeals also suggested that perhaps Kevin's claim for compensatory education did not even accrue until he returned to school sometime between October 1983 and January 1984. However, as the Court of Appeals acknowledged, other courts have held that an IDEA claim accrues "when the parents know or have reason to know of the injury or event that is the basis of their claim." *Hall* v. *Knott County Board of Education*, 941 F.2d at 408, quoting Wegner, *Educational Rights of Handicapped Children*, 17 Journal of Law & Education 625, 654 (1988). *Accord, McDowell* v. *Fort Bend Independent School District*, 737 F.Supp. at 389. During the entire period Mr. and Mrs. Murphy kept Kevin home from school, they knew he was missing school and that Timberlane was not requesting an administrative hearing.

In applying the "unitary violation" theory, the Court of Appeals literally invented a legal doctrine for this case. The Court of Appeals did not cite a single precedent on that issue. Timberlane has been unable to find a single case which mentions the term "unitary violation."[8]

If by a "unitary violation" the Court of Appeals meant a "continuing violation," its decision was still erroneous. Courts sometimes find continuing violations under civil rights laws which have short statutes of limitations. *E.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982) (180-day statute of limitations). The IDEA is not a civil rights law, and the six-year statute of limitations borrowed by the First Circuit is extraordinarily long. Moreover, a plaintiff claiming a continuing violation must usually demonstrate that, although the defendant's wrongful acts occurred both within and outside the statute of limitations, the plaintiff first learned of his injury within the statute of limitations. *E.g.*, *Sabree* v. *United Brotherhood of Carpenters and Joiners Local No. 33*, 921 F.2d 396, 399-402 (1st Cir. 1990). The Murphys do not satisfy that test; they knew of Kevin's injury in January, 1982, when they kept him home from school.

Furthermore, during the period Kevin was absent from school, things were not so "unitary" as the Court of Appeals assumed.

First, the period was divisible into three school years. State and federal law require that the school district review and revise a child's IEP at least once annually.

Second, the regulation which the Court of Appeals relied on, N.H. Admin. Code Ed. 1125, requires that a school district request an administrative hearing if a parent neither signs nor appeals an IEP. That regulation applied for the 1982-83 school year, but not for the periods January 1982 to June 1982 and September 1983 to January 1984 when there were no unsigned IEPs.

Third, the period January 1982 to January 1984 was divided by two summer recesses. Public schools close each summer. A disabled child is entitled to special education during the summer only if, in the absence of such extended school year programming, he would regress and lose most of the gains

[8] Timberlane's research included a search on Westlaw for any federal court using the terms "unitary violation" or "unitary violations."

made during the regular school year. N.H. Rev. Stat. Ann. 186-C:15. Kevin did not qualify for summer programming under that statute, and the Murphys do not claim that he did.

The only unifying factor was that, for most of this time, from January 1982 to January 1984, Kevin was out of school. *That* was not a "violation" on Timberlane's part. Timberlane offered Kevin special education, but Mr. and Mrs. Murphy refused to send him to school.

D. *Special legal standards should apply when selecting the appropriate statute of limitations to borrow for federal grant laws.*

The Supreme Court's previous cases on borrowing methodology do not involve federal grant statutes. This case presents an opportunity for the Court to consider the important question of how those borrowing standards should be applied or modified for grant laws.

The IDEA applies only to states which seek and receive federal IDEA funds. 20 U.S.C. §§ 1411-1413. *See Rowley*, 458 U.S. at 180-84.

Since the IDEA was enacted pursuant to Congress' Spending Power, the policies discussed in *Pennhurst State School* v. *Halderman*, 451 U.S. 1 (1981), apply. *Rowley*, 458 U.S. at 190, 204, notes, 11, 26.

In *Pennhurst*, the Supreme Court concluded that federal grant statutes must be interpreted and applied narrowly. They are analogous to contracts between Congress and participating states. "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17.

Pennhurst applies not only to states, but also to political subdivisions of the states, such as school districts. *See Guardians Association* v. *Civil Service Commission of New York City*, 463 U.S. 582, 596-97 (1983).

The principles announced in *Pennhurst* are especially relevant in this case, for two reasons. First, the relief sought by the Murphys, two years of compensatory education at $100,000 per year, is grossly disproportionate to the $300 which Timberlane received each year for Kevin under the IDEA. *See Pennhurst*, 451 U.S. at 24. Second, Congress has already defaulted on its part of the bargain, by failing to appropriate the amount it promised to states in the IDEA.

Pennhurst counsels that states and political subdivisions are entitled to predictability under federal grant statutes, so that they can decide whether to participate and how to plan their financial affairs. This court has rejected interpretations of federal grant statutes which render a state's liability "indeterminate," *Pennhurst*, 451 U.S. at 24, or which "give the courts carte blanche to impose upon the States whatever burden their various judgments indicate should be imposed." *Rowley*, 458 U.S. at 190, note 11.

The fact that the IDEA contains no statute of limitations and forces courts to borrow one is bad enough. The problem is compounded if the applicable borrowing standards encourage further *ad hoc*, *ex post facto* determinations by the courts, such as selecting the appropriate statute of limitations on a case-by-case basis.

The leading precedents on borrowing methodology involve civil rights statutes and emphasize the primacy of federal law. *E.g.*, *Wilson* v. *Garcia*, 471 U.S. at 271-72. That primacy is muted in federal grant statutes, which are partnerships between Congress and participating states.[8] Many provisions of the IDEA incorporate or defer to state law. *E.g.*, 20 U.S.C. §§ 1401(a)(18)(B), 1412(2)(B), 1415(a), (c). In this case, the Court of Appeals found the school district liable for violating a *state administrative regulation*, because the IDEA incorporates state law.

The Court of Appeals never cited *Pennhurst* and never acknowledged the principles announced in that case. Instead,

---

[8] In *Rowley*, 458 U.S. at 208, the court observed that the IDEA was not intended to "displace the primacy of States in the field of education."

the Court of Appeals likened this case to a "civil rights" action, which it is not.

The Court of Appeals' decision does violence to the principles of *Pennhurst* by contradicting the plain language of the statutes and introducing several levels of unpredictability. First, the Court of Appeals awarded compensatory education beyond age 21, even though the IDEA explicitly limits eligibility to students under age 21. Second, the court allowed the student to wait until after age 21, the statutory age limit, before initiating legal proceedings. Third, the court borrowed the longest possible statute of limitations, rejecting a four-year state statute of limitations which applies to actions against school districts. Fourth, the court suggested that the statute of limitations for requesting an administrative hearing under the IDEA should be selected on a case-by-case basis. Fifth, the court erased the statute of limitations by inventing a "unitary violation" theory.

An *unpredictable* statute of limitations prejudices school districts in many ways, profound and mundane. It robs school districts of the ability to plan, impacting such decisions as the purchase of insurance, the creation of reserve funds, and the retention of records.

The Court of Appeals' decision to borrow a *long* statute of limitations violates *Pennhurst* in another way. It allows courts to reinterpret the law and define school district responsibilities years after the disputed events occurred. It allows the courts to apply *current* standards of best practice to school district decisions made long ago.

II. The Circuits Are Divided Over Which State Statute Of Limitations To Borrow In IDEA Cases.

The circuits are widely divided over which state statute of limitations to borrow — a long one or a short one — in cases arising under the IDEA.

Most of these conflicting decisions involve the deadline for seeking *judicial review* of an administrative hearing officer's

decision under 20 U.S.C. § 1415(e)(2).[9]

This petition, in contrast, involves the deadline for *initiating* legal proceedings by requesting an *administrative hearing* under the IDEA.

The two lines of cases — concerning the deadlines for initiating legal proceedings and for seeking judicial review — have much in common. First, many of the same policies apply in both types of cases, such as the IDEA policy favoring quick resolution of disputes. Second, there is a need for coordination. Combining a long statute of limitations for seeking an administrative hearing with a long statute of limitations to file for judicial review would allow parents to "double dip" by waiting years before requesting an administrative hearing and years after the hearing officer's decision to seek judicial review.

The First Circuit's decision in this case, selecting a long statute of limitations for the initiation of a compensatory education case, directly conflicts with *Hall* v. *Knott County School District*, 941 F.2d 402, 408-409 (6th Cir. 1991), which favored a short of limitations in such cases. *See also Janzen* v. *Knox County Board of Education*, 790 F.2d 484, 487 (6th Cir. 1986), and *Dreher* v. *Amphitheater Unified School District*, 22 F.3d 228, 232 (9th Cir. 1994) (allowing a longer statute of limitations for reimbursement cases than for compensatory education cases).

The First Circuit's decision also indirectly conflicts with *Lester H.* v. *Gilhool*, 916 F.2d 865, 869 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991), which advised that students seeking compensatory education beyond age 21 should file claims *before* reaching age 21, while the evidence is still fresh, and with *Alexopulos* v. *San Francisco Unified School District*, 817 F.2d 551, 555-56 (9th Cir. 1987), which support strict

---

[9] *Amann* v. *Town of Stow*, 991 F.2d 929, 931-33 (1st Cir. 1993) (30 days); *Spiegler* v. *District of Columbia*, 866 F.2d 461, 464, 469 (D.C. Cir. 1989) (30 days); *Department of Education, State of Hawaii* v. *Carl D.*, 695 F.2d 1154 (9th Cir. 1983) (30 days); *Adler* v. *Dept. Education, State of New York*, 760 F.2d 454 (2d Cir. 1985) (4 months); *Schimmel* v. *Spillane*, 819 F.2d 477 (4th Cir. 1987) (1 year); *Scokin* v. *Texas*, 723 F.2d 432 (5th Cir. 1984) (2 years); *Alexopulos* v. *San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987) (3 years); *Tokarcik* v. *Forest Hills School District*, 665 F.2d 443 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982) (2 years or 6 years, with a dissent arguing for 30 days).

application of a short statute of limitations in compensatory education cases.

The particular statute of limitations which the First Circuit borrowed, six years, is longer than what any other court of appeals has borrowed for any original action under the IDEA.

Conclusion.

The petition for writ of certiorari should be granted and the Murphys' case should be dismissed because of their failure to request an administrative hearing within the statute of limitations. In IDEA cases, the court should borrow the shortest possible statute of limitations which allows parents reasonable time to prepare their request for an administrative hearing, which in this case was four years. This will discourage the filing of stale compensatory education claims by students over age 21 based upon events which occurred in the distant past. In the alternative, if the court borrows a six-year statute of limitations, that statute should be applied to bar the Murphys' claim for services missed before August 20, 1983.

Respectfully submitted,

GERALD M. ZELIN
Counsel of Record
SOULE, LESLIE, ZELIN,
SAYWARD AND LOUGHMAN
220 Main Street
Salem, NH 03079
(603) 898-9776
Counsel for the Petitioner

Table of Contents.

Appendix A
New Hampshire Department of Education Hearing Officer's Ruling on Jurisdictional Matters, February 27, 1990 A1

Appendix B
New Hampshire Department of Education Hearing Officer's Ruling on Motions for Reconsideration, April 23, 1990 A10

Appendix C
United States District Court Order, August 26, 1991 A17

Appendix D
United States District Court Judgment, August 26, 1991 A34

Appendix E
United States Court of Appeals Decision, August 19, 1992 A35

Appendix F
United States District Court Order, March 16, 1993 A45

Appendix G
United States District Court Order, May 10, 1993 A47

Appendix H
United States Court of Appeals Decision, April 28, 1994 A67

Appendix I
United States Court of Appeals Judgment, April 28, 1994 A91

Appendix J
United States Court of Appeals Order, June 16, 1994 A92

Appendix K
Statutes and Regulations A93

APPENDIX A.

KEVIN M. v. TIMBERLANE SCHOOL DISTRICT

CASE # 89-69

RULING ON JURISDICTIONAL MATTERS

February 27, 1990

By interim prehearing order dated January 2, 1990, the undersigned requested memoranda of law from the parties concerning three threshold questions which require resolution before a decision on holding an evidentiary hearing in this matter can be made. Those three items included:

A. The authority of a hearing officer to order compensatory education, or any relief, in this matter for a student who has reached the age of twenty-one (21).

B. Whether any legal barrier exists in this matter to a hearing officer considering an appeal concerning IEP's and/
or placements for the student between December 1981 and October, 1983.

C. The authority of a hearing officer to order a stay-put placement during the pendency of this appeal which would require the student to be educated according to his 1988-89 IEP and placement.

By agreement of the parties, the deadline date for filing memoranda was extended to February 9, 1990, on which date the memoranda were postmarked.

I. BACKGROUND

Kevin M. (the student) is a 21 year old male who has been identified as multihandicapped and visually impaired. The student turned 21 on July 9, 1989. On or about November 30, 1988 a meeting was held in the office of the superintendent of SAU 55, the SAU which includes the Timberlane School District (the district). At that meeting Kevin C. Murphy (the parent) asked the superintendent to request a determination from the school board of whether the district would fund the student's education beyond his 21st birthday. (See Affidavit of Terrance F. Holmes). On January 5, 1989 the school board voted to discontinue funding for the student's program on the day he turned 21. (School District Exhibit SJ (SJE) 110).

At a Planning and Placement Team meeting held on June 19, 1989, the district presented the parents with an Annual Statement of Placement (ASP) form to sign. That ASP was designed to discharge the student from district responsibility, effective on July 9, 1989. (SJE 126). On August 20, 1989, the parent signed the ASP form requesting a due process hearing in the matter. A prehearing conference was held on December 27, 1989. At that prehearing conference much time was devoted to the question of when the appeal actually commenced, due to the district's assertion that notice adequate under Ed. 1127.02 (a) had not been provided prior to the prehearing. The undersigned finds that issue, in the context of this matter, non-dispositive and rules that the appeal was commenced in a timely and appropriate fashion.

II. DISCUSSION

A. *Hearing Officer Authority to Order Compensatory Education*

The relief requested in this matter by the parent on behalf of the student is an order for compensatory education. That rem-

edy is in the nature of a request for equitable relief. The undersigned notes at the outset that this request will be viewed as a request for equitable relief.

This is not a declaration taken lightly by the undersigned, since there is no settled precedent in this jurisdiction concerning the powers of a hearing officer to offer equitable relief. For such guidance as exists concerning a hearing officer's authority, one must turn to both state and federal pronouncements.

The first issue to be resolved requires a two-part determination. First, it must be determined whether a hearing officer can order compensatory education in any instance. Second, the inquiry must encompass a determination concerning such relief for a student who has turned 21.

Turning first to an aspect of the latter issue, RSA 186-C:9 makes clear that a school district's responsibility ordinarily terminates when a handicapped student attains the age of 21. The parent's counsel asserted that the responsibility might extend through the 21st year, but reference to the definitions section of the chapter rebuts this assertion. RSA 186-C:2,I states as follows:

> "Educationally handicapped child" means any person 3 years of age or older *but less than 21 years of age* who has been identified and evaluated by a school district according to the provisions of RSA 186-C:7 . . . (emphasis added)

While the district's responsibility under ordinary circumstances is clear, this matter presents extraordinary circumstances, if the arguments advanced by the student's counsel are credible. The threshold determination remains whether a hearing officer can order compensatory education.

Counsel for both sides cite conflicting case law. However, no case law directly on point has been cited from either the New

Hampshire state courts, the Federal District Court for New Hampshire or the First Circuit Court of Appeals. Thus, no precedent binding on the undersigned has been cited, permitting the undersigned to fashion a reasonable threshold resolution.

The limits of a due process hearing officer's authority are not clearly established by statute or administrative rule or regulation. While the state Standards and federal regulations do provide some guidance, particularly with regard to procedural matters, they certainly do not address whether a hearing officer can order compensatory education. As has been noted, the precedent-setting courts governing New Hampshire have not spoken on this particular issue. In the absence of definitive guidance, the undersigned must interpret the law, and look to other courts for guidance.

The state has provided only that "all parties shall have an equal opportunity to a fair, timely, and impartial procedure for resolving disputes." (Ed. 1127.02). The New Hampshire emphasis in practice has been upon "resolving disputes".* Federal law provides for an impartial due process hearing (20 U.S.C. Sec. 1415(b)(2)), and for appeal to a state or federal court (20 U.S.C. Sec. 1415(e)(2)). State law calls for resolving disputes in the due process hearing setting. Federal and state law both establish an administrative hearing process, and require exhaustion of administrative remedies before going to court. This reflects a policy which encourages resolution of disputes at the administrative level, if possible, in order to take advantage of administrative expertise and the informal procedures offered in administrative settings. In this context, it appears somewhat absurd to argue that a hearing officer cannot,

* The undersigned has served as a hearing officer since February, 1989. During that time the undersigned has issued 12 decisions and been involved in another 5 to 10 cases which were resolved without a hearing. In monthly meetings of the state's hearing officers, and in the undersigned's own experience, there is a presumption that hearing officers are free to resolve disputes in any manner, consistent with the law, which has not been ruled beyond his or her jurisdiction by a court of competent jurisdiction.

just like a court, "grant such relief as the court determines is appropriate." (20 U.S.C. 1415(e)(2)). Without such broad power, a hearing officer will be significantly hindered in discharging his or her duty to resolve disputes. At least one federal court has reached the same conclusion (See *S-1* v. *Spangler*, 650 F.Supp. 1427, 1431-32 (Mid.Dist.N.C., 1986).

In the absence of contrary binding judicial guidance, the undersigned concludes that hearing officers have the same power as courts to grant appropriate relief. It follows that such relief could include compensatory education, where appropriate, if courts have the authority to offer such relief. While this ruling could include a lengthy analysis of case law containing such authority, the excellent memoranda provided by both counsel adequately cover such analyses. Suffice it to say that the undersigned is persuaded by the line of federal cases, cited by both counsel, which find that an award of compensatory education, where necessary to secure a handicapped student's right to a free, appropriate public education, is within the jurisdiction of the court. Thus, it is also within the jurisdiction of a hearing officer to award compensatory education. (See: *Meiner* v. *State of Missouri*, 800 F.2d 749 (8th Cir. 1986); *Jefferson County Board of Education* v. *Brun*, 853 F.2d 853 (11th Cir. 1988); and *Burr* v. *Sobol*, 863 F.2d 1071 (2d Cir. 1989), vacated and remanded 109 S.Ct. 3209 (1989), on remand aff'd per curiam, Docket No. 88-7275 (2d Cir., October 27, 1989).

If the student can establish that he was denied a free, appropriate public education, during a period when he was entitled to such an education, a hearing officer can order compensatory education to make up for that denial. If such a denial were established, the fact that the student has subsequently turned 21 does not prevent such an order. (Accord, see *Burr* v. *Sobol, id.*).

B. *Legal Barriers to Considering Appeal Concerning 1981-83 Actions*

The district contends that this appeal is barred either by reference to an analogous statute of limitations, or by the equitable doctrine of laches. The parent disputes this contention and argues that laches does not apply, and that the analogous statute of limitations is six years. The parent further argues that either the appeal falls within the statutory period, or the statue of limitations has been tolled by virtue of the student's disability.

In addition, the district maintains that the special education laws require and establish a "fast track" for appeals of special education disputes. The district argues that this appeal cannot be maintained by the parent because it was not brought in a timely manner, that is, back in 1982 or 1983. This argument fails because of the district's actions. The district's actions reveal that the parent essentially refused to agree to any of the programs offered by the district during that period. Under the 1981 standards in effect at that time, the district had an obligation to request a due process hearing if it believed its proposed program was in the best interests of the student. (See 1981 Standards, Ed. 1125.01(b)(2)). Their failure to do so means that they cannot equitably argue that the parent should be barred from consideration for the requested relief because he refused to exercise his right to appeal. The district also refused to exercise that right.

Regarding laches, it should be noted that this is an equitable doctrine. Another equitable doctrine holds that "[e]quitable relief will be denied if one comes to the court with unclean hands." *Noddin* v. *Noddin*, 123 N.H. 73, 76 (1983). In this case, the district is asking for the benefit of a discretionary equitable remedy, namely, a determination that the student's appeal is barred by laches. Once again, the district's failure to request a due process hearing to vindicate its decisions con-

cerning the student in a 1982 amount to "unclean hands". Furthermore, the district failed to file a truancy petition until nearly a year after the student stopped attending school. (See SJE 62). The district also found it necessary to place responsibility for this student's program with a non-district employee (George Wright, See SJE 74) before it was able to resolve the impasse with the parent.

Under these circumstances, providing the district with the benefit of this doctrine would not constitute a sound exercise of equitable discretion. Therefore, the undersigned declines to rule that this appeal is barred by laches.

The other ground upon which the district rules is a statute of limitations. Since neither the state statute (RSA 186-C) nor the federal Education for All Handicapped Children Act (EAHCA, 20 USC Sec. 1401 et seq.) provide a statute of limitations, guidance must be sought in judicial pronouncements. Concerning this issue, the Federal District Court for New Hampshire has provided some guidance. In the case of *James* v. *Nashua School District*, 720 F.Supp. 1053 (D.N.H. 1989), Chief Judge Devine ruled that "RSA 508:4, I provides the most appropriate state statute of limitations for an action under the [Education for All Handicapped Children Act]." *Id.* at 1058. Although the issue in that case concerned attorney fees, the reasoning can be generally applied to all actions under the EAHCA.

Prior to its amendment in 1986, RSA 508:4, I provided for a six year statute of limitations. The 1986 amendment provided that the shortened three-year statute of limitations would apply to all actions arising on or after July 1, 1986. New Hampshire Laws of 1986, Chapter 227:22, II. Since this appeal concerns mainly issues which arose in the period between December, 1981 and October, 1983, the cutoff date under RSA 508:4, I would be October, 1989. The undersigned rules that this appeal was perfected within the deadline of the cited statute of limitations, and is, therefore, not barred by that statute.

C. *Authority Concerning Stay-Put Placement*

The student's counsel urges the undersigned to order a stay-put placement under the provisions of Ed. 1127.02(a)(11). In doing so, he argues that such an order is appropriate because of the possibility that the student may prevail in this appeal.

However, there is no dispute that the student has reached the statutory age limit for services. Therefore, the district, absent an order in favor of the student, has no obligation to provide further services. Should the district prevail following an evidentiary hearing, how would it recover the thousands of dollars it would have spent unnecessarily to maintain the student at Pinkerton while this appeal was pending?

Finally, since the student seeks an equitable remedy in this matter, equity must guide this decision as well. During the 1981 through 1983 period, the record reveals that the parent was frequently uncooperative and less than forthcoming concerning legitimate district requests for input. (See, e.g., Transcript of September 8, 1982 team meeting, pages 39, 63, 70, 74 and 83; Transcript of September 13, 1982 team meeting, pages 28, 31 and 35). Relying again on the equitable doctrine of "clean hands" cited above, the undersigned is unable, in light of the parent's conduct, to provide him with the benefit of an exercise of equitable discretion concerning the stay-put placement.

Accordingly, in the unique circumstances of this case, where the student will not be entitled to further education of any kind at school district expense unless he prevails in this appeal, and because of the parent's obstructionist conduct durng the period when the district was trying to prepare and offer a program acceptable to the parent, the undersigned declines to order a stay-put placement during the pendency of this appeal.

III. ORDER

Both parties are ordered to appear at a prehearing conference to be held at the State Department of Education, on Friday, March 16, 1990 at 9:15 A.M. to prepare for the evidentiary hearing. In addition to attempting to narrow the issues for hearing, the parties shall come prepared to discuss entering into an agreed statement of facts, agreeing to non-duplicative exhibits, limitations on witnesses, and such other matters as will expedite the conduct of the hearing.

So ordered,

_____

John Dabuliewicz
Hearing Officer

April 23, 1990

APPENDIX B.

KEVIN M. v. TIMBERLANE SCHOOL DISTRICT

CASE # 89-69

RULING ON MOTIONS FOR RECONSIDERATION

April 23, 1990

I. INTRODUCTION

By motion dated March 14, 1990, the Timberlane School District (the district) requested reconsideration of the undersigned's February 27, 1990 "Ruling on Jurisdictional Matters" (the Ruling) based on multiple grounds. On March 30, 1990, counsel for Kevin M. (the student) filed both a partial objection to the aforementioned Motion for Reconsideration, and a Limited Motion for Reconsideration on behalf of Kevin M., the latter based upon a perceived inappropriate conclusion by the undersigned concerning the parent's actions in this matter.

For the record, it should also be noted that counsel for Kevin M. filed, on March 30, 1990, a request for a 24-hour extension of the March 29, 1990 deadline (set by the undersigned in a March 21, 1990 order) for his reply to the district's Motion for Reconsideration. This request had been orally granted by the undersigned over the telephone on March 29, 1990. The reply was actually postmarked March 31, 1990, but the undersigned has fully considered the arguments made despite this failure to timely file the documents.

II. DISCUSSION

In its Motion for Reconsideration, the district argues that the finding of "unclean hands" made against it in Section Ii. B

of the Ruling was incorrect. Since the undersigned barred the defense of laches based largely on the existence of "unclean hands", it is fair to reexamine that issue at this point.

The district propounds four reasons to support its claim and it is not guilty of "unclean hands" due to its failure to initiate a due process hearing back in the 1981-83 time period. These include:

1) Ed. 1125.01(b)(2) and (3) were arguably invalid;

2) Mr. Murphy could have filed his own appeal;

3) Mr. Murphy would have obtained an unfair tactical advantage if the school district initiated such an administrative hearing;*

4) the hearing officer lacked jurisdiction to compel [the student's] attendance at school. (See District Memorandum in Support of Motion for Reconsideration, March 14, 1990)

The undersigned finds ground number 4 persuasive on the issue of the district's failure to file an appeal. RSA 186-C:17 would have prevented the enforcement of any order requiring the parents of the student to return him to school during the period between December, 1981 and October, 1983. Therefore, although it was somewhat late, the district's choice to file a truancy petition in November, 1982 was the appropriate manner to seek to compel the parents of the student to return him to school. Furthermore, the Supreme Court has stated:

---

* The undersigned is appalled at this particular assertion, which, while understandable from a tactician's point of view, completely ignores the district's legal and ethical obligation to act in the best interests of the student. To assert this in a pleading document as a valid reason not to seek a due process hearing, when a district believed its proposed program was in the student's best interest, shows more chutzpa than sense of obligation.

> . . . the equitable doctrine of "clean hands" . . . has been characterized as . . . permitting a court to consider the element of *plaintiff's fault* in its resolution of a legal dispute . . . *Reen* v. *Berton*, 115 N.H. 424, 426 (1975) (emphasis added)

There is no mention by the Court of the defendant's fault in the assertion of the unclean hands defense. (Accord, *Dove* v. *United States*, 1987 Westlaw 14497 (U.S. Dist. Ct., District of Columbia, Civil Action No. 86-0065, slip opinion, October 9, 1987). Therefore, the undersigned, upon reconsideration, finds that the district was not guilty of unclean hands.

Thus, the inquiry must again turn to the issue of laches. The New Hampshire Supreme Court provides the following guidance on this matter:

> Laches, unlike limitation, is not a mere matter of time, but is principally a question of the inequity of the claim to be enforced — an inequity founded on some change in the conditions or relations of the property or the parties involved. (cite omitted). When the delay in bringing suit is less than the applicable limitation period, laches will constitute a bar to the suit only if the delay was unreasonable and prejudicial. *Jenot* v. *White Mt. Acceptance Corp.*, 124 N.H. 701, 710 (1984).

Since the undersigned declines to reconsider the previous finding concerning the applicable analogous period of limitations, the decision whether to reverse upon reconsideration turns upon a finding that the actions of the appellant were unreasonable and prejudicial. For this determination, the undersigned will examine the actions of the parent of the student. This is appropriate in light of the fact that the student was still a minor

during the 1981-83 period. Under the provisions of Ed. 1125.01 and Ed. 1127.02, it is clear that appeal rights vest in the parents of a minor student. Likewise, due to their court granted guardianship, this student's parents can continue to appeal matters affecting the student, despite his having attained the age of majority.

A question which has plagued the undersigned in this matter is, why did the parent fail to file a due process appeal during the long period when he refused to allow the student to attend school, or to agree to any program offered by the district? The record as it currently stands shows only an adamant refusal by the parent involved to participate in a meaningful way in the district's attempts to fashion a program acceptable to him. (See Transcripts cited on p. 5 of Rulig). Availing himself of a due process appeal would have provided a way to force the district to provide a program acceptable to the parent. Of course, it would also have forced him to present evidence as to what that program should entail, something he refused to provide to the district during the long process of negotiations over an IEP.

Ultimately, the district, after failing in its attempt to have the student declared truant, offered a program which the parent accepted. There has been no complaint about the contents of that program since it was initiated in late 1983, or early 1984. The complaints about the past have only arisen since the district, acting in accordance with the provisions of RSA 186-C:9, has terminated its services to the student. It appears from these circumstances that the delay by the parent in seeking relief was unreasonable. It is likely that no such relief would ever have been sought, except for the district's 1989 action terminating the student's program, which action is authorized by law. The determination to characterize the programs offerred by the district back in the 1981-83 period as inappropriate should not turn on whether the parent is satisfied with actions taken six or

or more years later by the district. The parent certainly bears a portion of the responsibility for the long delay in getting the student back into school, which buttresses the conclusion that his actions were unreasonable.

Having determined that the parent's actions were unreasonable, the second prong of the test is whether they caused prejudice to the district. Because the student is now 21, the state will not reimburse the district for any compensatory education provided to the student. (See SJE 112). Furthermore, as an experienced hearing officer, the undersigned has repeatedly seen the difficulties involved in trying to reconstruct both the facts and the circumstances surrounding long-ago events which are the subject of a due process hearing. The district has asserted that it may be unable to compel attendance by various important witnesses from the 1981-83 period. Even if it can find these witnesses, memories of that period will be highly unreliable. In addition, the evidence is now stale and likely to engender contradictions which, like the proverbial Gordian knot, may be impossible to untangle, especially in a case like this which entails such animosity. Therefore, the undersigned concludes that the district has been prejudiced by the parent's failure to timely initiate an appeal concerning the appropriateness of the programs offered by the district in the period between December, 1981 and October, 1983.

Thus, upon reconsideration, the undersigned finds that the appeal in this matter is barred by laches.

While it is unnecessary to reach the other grounds advanced by the district, one of them should be mentioned in order to avoid raising false hopes on the part of the appellant. First, it should be noted that the promissory estoppel issue which counsel for the district urges to be resolved was not included by the undersigned in the January 2, 1990 prehearing order as one of the issues to be briefed, and neither counsel requested it be so included. Furthermore, contrary to the assertion by

counsel for the district in his March 14, 1990 memorandum supporting the reconsideration motion, promissory estoppel is a theory upon which to base a claim for relief, not a form of relief. The interim order, by its terms, did not invite the briefing of that issue, and a letter from counsel asserting that it did so does not change the intent of the order.

Nevertheless, the issue is easily disposed of and to do so seems appropriate at this time. Counsel for the parent relies almost exclusively upon remarks attributed to George Wright which appear in an article in the Plaistow-Hampstead News as the basis for the assertion of promissory estoppel as a theory for relief. However, Mr. Wright submitted an affidavit, dated February 9, 1990, which the district included in its submissions in response to the interim prehearing order. That affidavit states, in part:

> 3. I never informed Kevin M. Murphy's parents that the Timberlane Regional School District would provide special education beyond Kevin's twenty-first birthday. This is because the Timberlane Regional School District never authorized me to offer special education beyond Kevin W. Murphy's twenty-first birthday.
>
> 4. I do not recall anyone ever informing Kevin W. Murphy's parents that the Timberland Regional School District would provide special education beyond Kevin W. Murphy's twenty-first birthday.

This issue comes down to the contents of a newspaper article, something which is highly suspect as reliable evidence, versus a sworn statement by the person whose remarks the newspaper article purports to accurately reflect. The undersigned has no choice but to accord dispositive weight to the sworn statement. Thus, the probative evidence requires a conclusion that no theory of promissory estoppel is available to the appellant to compel the relief sought.

III. CONCLUSION

Based upon the rather extensive record before the undersigned, the equities in this matter call for a conclusion that the appeal is barred by laches, and that no claim for promissory estoppel is supportable. The district's Motion for Reconsideration is therefore granted, and the appeal is dismissed. The appellant's Motion for Partial Reconsideration is denied.

So ordered,

_____

John Dabuliewicz
Hearing Officer

April 23, 1990

APPENDIX C.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Kevin W. Murphy, by and through his legal guardians, Kevin C. and Janice Murphy

v. Civil No. 90-265-D

Timberland Regional School District

ORDER

This action is an appeal from a hearing officer's decision in an Education for All Handicapped Children Act (EAHCA)[1] action pursuant to 20 U.S.C. § 1415, and a civil rights action alleging various violations of rights secured by the EAHCA under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and state law. All of plaintiffs' claims arise from a denial of education between January 1, 1982, and December 31, 1983.

Presently before the court is defendant's motion for summary judgment. Plaintiffs have timely objected thereto.

Factual Background

The student in this case, Kevin W. Murphy, was born on July 9, 1968, to Janice and Kevin C. Murphy. Defendant School District Exhibit 1 to Motion for Summary Judgment filed with Hearing Officer Below (hereinafter "SD Exhibit SJ"). Kevin developed normally until he was two and one-half

[1] After plaintiffs commenced this action, the EAHCA was amended and named the Individuals with Disabilities Education Act (IDEA), P.L. 101-476 (Oct. 30, 1990), 20 U.S.C. § 1400, *et seq.*

years old, at which time he was admitted to Portsmouth Hospital for a tongue operation. During the operation, he suffered from oxygen deprivation, which caused brain damage. Since that date, Kevin has suffered from spastic paraplegia, cortical blindness in the form of visual agnosia (difficulty processing visual stimuli), tactile agnosia (difficulty processing tactile input), and mild mental retardatin. *E.g.*, SD Exhibit SJ 58.

In September 1976 the Murphy family moved from Nashua to Plaistow, which is in the Timberlane Regional School District ("Timberlane"). While living in Nashua, Kevin received special education at the Kimi Nichols Center in Plaistow. After moving to Plaistow, he continued to attend that program, at the expense of Timberland. SD Exhibit SJ 2.

During the 1978-79, 1979-80, and 1980-81 school years, Kevin attended a special education program at Pollard School, a public elementary school in Timberland. SD Exhibits SJ 3, 4, 5, 6, and 7. In September 1981, Mr. Murphy and the School District agreed to a 1981-82 placement for Kevin in a special program for students with visual impairments at the Charlotte Avenue School, a public elementary school in the Nashua School District. SD Exhibits SJ 8, 8a, 9, 10, 11, 28. As early as October and November of that year, however, Mr. Murphy seemed to question this placement. *See* SD Exhibits SJ 12, 13. On December 22, 1981, Kevin suffered a seizure while at the Charlotte Avenue School, and as a result, Mr. Murphy withdrew Kevin from that program on January 2, 1982. SD Exhibit SJ 15.

On January 26, 1982, Dr. Artemas Packard, the Murphy family's physician, wrote to Timberlane stating that "to return Kevin to his educational placement in Nashua would not be appropriate medically." However, Dr. Packard did not explain why the Nashua placement would be inappropriate, nor did he state what sort of program would be appropriate. SD Exhibit SJ 18.

On February 24, 1982, in a letter to Timberlane Superintendent Robert Crompton, Mr. Murphy disclosed that he had removed his son from the Charlotte Avenue program because "Kevin's teachers in Nashua informed me on 10/30/81 that Kevin had become a 'physical danger to himself.' " This letter also stated that three physicians had advised against returning Kevin to the Charlotte Avenue program. The letter did not explain why Kevin was a "physical danger to himself", nor did it specifically identify which Nashua teachers had reached that conclusion. SD Exhibit SJ 26. In the interim, defendant repeatedly attempted to schedule pupil placement team meetings to reevaluate Kevin's placement, inviting the parents' input. In response, Mr. Murphy wrote what can most favorably be characterized as sarcastic, vilifying letters. *See* SD Exhibits SJ 27, 29, 30, 31, and 32. Plaintiffs also filed numerous formal complaints with the State Commissioner of Education, challenging the legality of Timberlane's actions. Plaintiffs' Objection to Motin for Summary Judgment, Exhibit H (Affidavit of Kevin C. Murphy, Legal Guardian).

On April 12, 1982, counsel for Timberlane Regional School District wrote to James Fleming, counsel for Mr. Murphy, threatening to initiate a truancy proceeding, which Timberlane perceived as the only way to get Kevin into school. SD Exhibit SJ 34. Mr. Murphy and the School District then agreed to schedule another pupil placement team meeting for May 6, 1982. SD Exhibit SJ 36. On April 26, 1982, Mr. Murphy took Kevin to Children's Hospital in Boston for a reevaluation. SD Exhibit SJ 35.

As a result of the May 6 meeting, the School District and Mr. Murphy agreed that Kevin would return to the Pollard Elementary School for the balance of the 1981-82 school year (12 days) without a new Individual Education Program (IEP). SD Exhibits SJ 38, 39, 40. An interim proposed IEP for the 1982-83 school year was developed by a pupil placement team

as early as the summer of 1982. Mr. and Mrs. Murphy disagreed with this plan. SD Exhibits SJ 47-52a. Subsequent pupil placement team meetings were held on September 8 and 13, 1982.

Kevin did not attend school during the 1982-83 school year. SD Exhibit SJ 53. Superintendent Crompton authorized a home tutor for Kevin while his placement was being "reassessed", but the school was unable to find a suitable tutor. SD Exhibits SJ 19, 23, 25. Timberlane again threatened to initiate truancy proceedings. SD Exhibits SJ 53, 55, 59. On November 5, 1982, the School District requested assistance from the State Department of Education in mediating this dispute. SD Exhibit SJ 60.

On November 12, 1982, Mr. Murphy filed a complaint with the State Department of Education challenging the appropriateness of the IEP offered by the School District for Kevin for the 1982-83 school year. SD Exhibit SJ 61. He did not, however, request an administrative hearing.

On November 19, 1982, the Timberlane Regional School District filed a CHINS (Child in Need of Services) petition in Plaistow District Court under New Hampshire Revised Statutes Annotated (RSA) 169-D, alleging that Kevin was truant in violation of the compulsory attendance statute. SD Exhibit SJ 62. In early 1983, however, the parties agreed to place the truancy petition on hold pending the completion of several evaluations and attempts at mediation. The School District agreed that George Wright, Executive Director of SERESC,[2] could serve as mediator. SD Exhibit SJ 69.

On August 29, 1983, the parties agreed that Mr. Wright would serve as the Timberlane Regional School District's representative at further pupil placement team meetings involving Kevin. Subsequently, Mr. Murphy and the team agreed to a

[2] SERESC is a private, nonprofit corporation in Derry, New Hampshire, which works closely with school districts to provide special education and evaluations for handicapped students.

diagnostic special education placement at Pinkerton Academy[3] for the period of October 10 through November 30, 1983. SD Exhibit SJ 75-79. In December 1983, Mr. Murphy and the pupil placement team agreed to an IEP for the period December 1983 through November 30, 1984, calling for placement in the Get Set Program at Pinkerton. SD Exhibits SJ 83-83. Kevin remained in the Get Set Program for the 1984-85 through 1988-89 school years. SD Exhibits SJ 87, 87, 88, 89, 91, 94, 95, 96, 97, 98, 99, 100, 103, 107-09.

On January 16, 1984, the Timberlane Regional School District withdrew the CHINS petition in Plaistow District Court because Kevin was then attending school. SD Exhibit SJ 84.

On January 5, 1989, the Timberlane School Board voted not to extend educational services to Kevin past his twenty-first birthday, SD Exhibit SJ 110, and Mr. Murphy was so informed. SD Exhibit SJ 110a.

Six months later, Mr. Wright sent a notice to Mr. Murphy scheduling a pupil placement team meeting for June 7, 1989, to "Sign ASP [Annual Statement of Program] to discharge." SD Exhibit SJ 118. The meeting was rescheduled for June 19 at Mr. Murphy's request. SD Exhibits SJ 119, 120. On June 15, 1989, Mr. Wright wrote to Mr. Murphy reiterating that the purpose of the meeting was to discharge Kevin from special education effective on his twenty-first birthday. SD Exhibits SJ 120, 121. On the scheduled date, the pupil placement team met with Mr. Murphy and presented an ASP form discharging Kevin from special education effective on his twenty-first birthday. SD Exhibits SJ 122, 126.

On August 22, 1989, Mr. Murphy returned the ASP to Mr. Wright, dated August 20, 1989, appealing the discharge and requesting an administrative hearing. SD Exhibit SJ 126.

---

[3] Pinkerton Academy is a private high school in Derry, New Hampshire, which functions as the public high school for the Derry School District.

The hearing officer initially concluded that he had jurisdiction to grant compensation for education, and rejected the School District's suggestion that Kevin's appeal was barred on the theory of laches. Hearing Officer John Daubliewicz's Ruling on Jurisdictional Matters (Feb. 27, 1990) ("Ruling on Jurisdictional Matters"). However, upon reconsideration, the hearing officer reversed himself on the laches issue, and the appeal was dismissed. Hearing Officer John Daubliewicz's Ruling on Motions for Reconsideration (April 23, 1990) ("Ruling on Reconsideration").

Kevin W. Murphy, now 23 years old, by and through his legal guardians Kevin C. and Janice Murphy, appeals the decision of the hearing officer to this court seeking compensatory education for the educational services he did not receive between January 1, 1982, and December 31, 1983.

Standard of Review

In reviewing a hearing officer's EAHCA decision, the district courts are to "receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on a preponderance of the evidence, shall grant such relief as the court determines is appropriate." *G.D.* v. *Westmoreland School Dist.*, 930 F.2d 942, 945 (1st Cir. 1991) (citing 20 U.S.C. § 1415(e)(2)). The courts review is to be "something short of a complete de novo review," *Board of Ed. of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176, 206 (1982); *G.D.* v. *supra* at 945; *Colin K. by John K.* v. *Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983), yet the court is required to render "an independent ruling." *Roland M.* v. *Concord School Comm.*, 910 F.2d 983, 989 (1st Cir. 1990), *reh'g en banc denied*, No. 89-2130, slip op. (Sept. 14, 199), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1122 (1991) (citing *Burlington* v. *Department of Ed.*, 736 F.2d 773, 790 (1st Cir. 1984) ("*Burlington II*"), *aff'* ,471 U.S. 359 (1985));

Rowley, supra at 205; *Abrahamson* v. *Hershman*, 701 F.2d 223, 230 (1st Cir. 1983)).

More specifically, the First Circuit has held that the district court must render a "bounded, independent decision[] — bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." *Roland, supra* at 990 (citing *Burlington II, supra* at 791).

The comparatively simple standard the court must apply to a motion for summary judgment is that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affifdavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The burden is on the moving party to establish the lack of a genuine issue of material fact, *Finn* v. *Consolidated Rail Corp.*, 782 F.2d 13, 15 (1st Cir. 1986), and the court must view the record in the light most favorable to the nonmovant, according to the nonmovant all beneficial inferences discernible from the evidence. *Oliver* v. *Digital Equip. Corp.*, 846 F.2d 103, 195 (1st Cir. 1988).

In its motion for summary judgment, defendant has proposed numerous alternative theories of why it should be entitled to judgment as a matter of law.

1. Substantive Hurdles

Defendant's substantive challenges to plaintiffs' EAHCA claims revolve mainly around three contentions: (1) that compensatory education either is not an appropriate remedy under the EAHCA, or alternatively, is not awardable by the hearing officer; (2) that even if compensatory education is available under the EAHCA, it cannot be awarded to a student who is over

the age of 21; and (3) that the plaintiffs have failed to state a proper cause of action for violation of section 504 of the Rehabilitation Act of 1973.

a. *The EAHCA and Compensatory Education*

Early courts denied both retroactive reimbursement costs and compensatory education under the EAHCA, reasoning that EAHCA did not provide for "damages". *See generally* Zirkel, Commentary, *Compensatory Educational Services in Special Education Suits*, 64 West Education Law Reporter 623 (Feb. 1991) (discussing the trend in courts since the mid-1950s to acknowledge compensatory or remedial educational services). However, in *Burlington School Comm.* v. *Massachusetts Dept. of Educ.*, 471 U.S. 359, 369 (1985), the Supreme Court unanimously held that reimbursement costs were not "damages", but rather that "[r]eimbursement merely requires the town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Id.* at 369. The Supreme Court reasone that the EAHCA gave the courts the power to award such costs since "the statute directs the court to 'grant such relief as [it] determines is appropriate.' The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be 'appropriate.' " *Id.*

A number of courts have analogized the logic of the *Burlington* court to encompass compensatory education, reasoning that compensatory education, like reimbursement, is an available and necessary remedy under the EAHCA to preserve a handicapped child's right to a free and appropriate education. *Burr by Burr* v. *Ambach*, 863 F.2d 1071 (2d Cir. 1988) ("*Burr I*"), *vacated and remanded, Sobol* v. *Burr*, 492 U.S. 902 (1988), *reaff'd sub nom., Burr* v. *Sobel*, 888 F.2d 258 (2d Cir. 1988) ("*Burr II*"), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1298 (1989); *Jefferson County Bd. of Educ.* v. *Breen*, 853 F.2d

853, 857-58 (11th Cir. 1988); *Miener by and through Miener* v. *State of Missouri*, 800 F.2d 749, 753 (8th Cir. 1986).

Moreover, compensatory education is well within the broad discretion granted to the courts by the statute. *Todd D. by Robert D.* v. *Andrews*, 933 F.2d 1576 (11th Cir. 1991); *Jefferson County, supra*.

While the First Circuit has not yet directly addressed the question of compensatory education, it has clearly stated that the EAHCA's mandate that courts "grant such relief as the court determines is appropriate" should be interpreted generously:

> Plainly [§ 1415(e)(2)] authorizes a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives. Moreover, because the Act is remedial in nature, we are charged with interpreting its provisions generously so to effectuate the important goals Congress intended to achieve.

Doe v. *Brookline School Comm.*, 722 F.2d 910, 9191 (1st Cir. 1983).

In light of *Doe*, this court agrees with those courts that have held that compensatory education is an appropriate remedy under the EAHCA. Indeed, if an eligible child has been totally denied educational services as guaranteed by the EAHCA, there seems no better equitable remedy than compensatory education, if such education is feasible.

b. *Compensatory Education Past the Age of 21*

Defendant next argues that even if the EAHCA will support an award of compensatory education, such an award cannot be granted to a plaintiff who is past the age of twenty-one. Both parties note that courts are split on the issue of whether

compensatory education can be awarded for a student older than twenty-one. Neither the First Circuit nor this court has ruled on this particular question to date.[4]

A number of other circuit and district courts have held, however, that compensatory education can be granted even if it means the school district will have to provide education past the student's twenty-first birthday. *Jefferson County, supra* (awarding compensatory education for two years past the plaintiff's twenty-first birthday); *Burr I* and *Burr II, supra* (awarding one and one-half years of compensatory education beyond plaintiff's twenty-first birthday); *Lester H., supra* (awarding two and one-half years of compensatory education past plaintiff's twenty-first birthday); *Todd D. by Robert D., supra* (remanding to district court with instructions to award compensatory education past plaintiff's twenty-first birthday for an unspecified amount of time).

Defendant contends, however, that all of these cases were brought prior to plaintiff's twenty-first birthday and that the Supreme Court's ruling in *Honig* v. *Doe*, 484 U.S. 305, 318 (1988), precludes an award of compensatory education for students who have already turned twenty-one.[5] In addition to the numerous factual distinctions between *Honig* and the present case,[6] at least one court has since held that *Honig* does not

---

[4] The court acknowledges that a recommendation on a similar question has been issued by this court's magistrate judge in *Cocores* v. *Portsmouth, N.H., School District*, No. 90-380-D (Feb. 15, 1991). Whereas the facts in *Cocores* are significantly distinguishable, and the magistrate judge's report and recommendation has not yet been approved, this court will not here consider that report and recommendation as controlling.

[5] Defendant relies on one sentence in *Honig*, in which the court found, "Respondent John Doe is now 24 years old and accordingly is no longer entitled to the protections and benefits of the EHA which limits eligibility to disabled children between the ages of three and twenty-one." *Honig, supra*, 484 U.S. at 38 (citing 20 U.S.C. § 1412(2)(B)).

[6] The dispute in *Honig* grew out of the efforts of certain San Francisco School District officials to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities.

preclude an award of compensatory education past the age of twenty-one when the original denial took place at a point in time when the student was legally entitled to an education. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1317 (1991).

In *Lester H.*, the Third Circuit distinguished *Honig* as follows:

> The crucial difference between *Honig* and Lester's case is the nature of the relief. In *Honig*, Doe was only asking that the Court make the District comply with the Act in the future. But, as an adult (i.e., someone over age 21), Doe had no right to demand that the District comply with the Act either presently or in the future. The Act only gives minors the right to education. Lester, in contrast, is only requesting a remedy to compensate him for rights the district already denied him. He has the right to ask for compensation because the School District violated his statutory rights while he was still entitled to them.
>
> If *Honig* stands for the propositon defendants assert, school districts would be immune from suit if they simply stopped educating intended beneficiaries of the EHA at age 18 or 19. Those beneficiaries' cases would take at least two years to be reviewed, and even if the reviewing courts found the school districts' behavior egregious, the courts would be powerless to aid the intended beneficiaries because those beneficiaries would now be over 21. We cannot believe that either Congress or the Supreme Court meant to allow a school district to withhold a disabled minor's educational rights at age 18 or 19 without remedy.

Id. at 872.

Likewise, in the present case, plaintiff seeks compensation for educational services he was denied prior to his twenty-first birthday. If Kevin's parents had brought this action before Kevin turned twenty-one years old, it is undisputed that the court could have ordered compensatory education to continue past his twenty-first birthday. *See Lester H., supra*; *Meiner, supra*; *Jefferson County, supra*; *Burr I* and *Burr II, supra*. And at least one court has allowed a twenty-two-year-old plaintiff to maintain an EAHCA claim based on a denial of education which took place prior to the plaintiff's twenty-first birthday on the ground that plaintiff sufficiently alleged that EAHCA procedures were "grossly violated". *Mrs. C.* v. *Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990). In short, it is this court's view that Congress did not intend "twenty-one" to be a statute of limitations, barring all compensatory education claims. Rather, the "three to twenty-one" age range represents a handicapped child's period of entitlement to a free appropriate education under the statute.

c. *Authority of the Hearing Officer*[7]

Defendant alternatively argues that even if the courts have the ability to award compensatory education, this authority does not extend to the hearing officer. Once again, this issue is one of first impression for this court and this circuit. This court does not have much difficulty, however, in concluding that the hearing officer should have the same authority to award compensatory education as does the court.[8] In so holding, this

[7] While the hearng officer did not rule as to the substantive merits of this case, he did hold that hearing officers had the authority to award compensatory education if the equities of the case so merited such an award.

[8] The court notes that the United States Department of Education has recently stated its support for this conclusion and opined that "a hearing officer has the authority to grant any relief he/she deems necessary, inclusive of compensatory education, to ensure that a child receives the free appropriate public education to which he/she is entitled." 17 E.H.L.R. 523 (Feb. 13, 1991).

court finds the conclusions of the hearing officer in this case to be particularly cogent:

> Federal and state law both establish an administrative hearing process, and require exhaustion of administrative remedies before going to court. This reflects a policy which encourages resolution of disputes at the administrative level, if possible, in order to take advantage of administrative expertise and the informal procedures offered in administrative settings. In this context, it appears somewhat absurd to argue that a hearing officer cannot, just like a court, 'grant such relief as the court determines is appropriate.' (20 U.S.C. 1415(e)(2). Without such broad power, a hearing officer will be significantly hindered in discharging his or her duty to resolve disputes.

Ruling on Jurisdictional Matters at 8.

Since a plaintiff must first exhaust his administrative remedies under the EAHCA before coming to federal court, it would be counterproductive to hold that the hearing officer cannot award compensatory education, but the district court on appeal can.

d. *Section 504 of the Rehabilitation Act*

Defendant further argues that plaintiffs have failed to state a cause of action against the school district under section 504 of the Rehabilitation Act. The court agrees. To state a *prima facie* case for a section 504 action, plaintiff must show not only the denial of a protected right, but also the school district officials have a "particular animus towards learning disabled children." *Colin K., supra*, 715 F.2d at 10. The rather substantial written record is devoid of evidence that could lead this court to believe that the school district's actions were motivated by a discriminatory animus toward learning disabled children.

2. *Laches*

Laches operates as a bar upon the assertion of a party's rights when the party has unreasonably delayed in bringing suit so as to the cause prejudice to the opposing party. *Costello* v. *United States*, 365 U.S. 265, 282 (1961); *K-Mart* v. *Orient*, 875 F.2d 907, 911 (1st Cir. 1989); *see also Jenot* v. *White Mt. Acceptance Corp.*, 124 N.H. 701, 710, 474 A.2d 1382, 1386 (1984).

In his original order, the hearing officer denied defendant's use of the laches defense because of Timberlane's failure to request a due process hearing to vindicate its decisions concerning Kevin in 1982, for its failure to file a truancy petition until nearly a year after the student stopped attending school, and for the need to place responsibility for developing an educational program for Kevin with Mr. Wright, a non-district employee, before it was able to resolve the impasse with Mr. Murphy, all of which amounted to "unclean hands". Ruling on Jurisdictional Matters at 4.

Upon reconsideration, however, the hearing officer concluded that plaintiffs' appeal was barred by laches. Specifically, the hearing officer found that laches was an appropriate defense under the circumstances because of what he gleaned from the record as "uncooperative" and less than forthcoming behavior on the part of Mr. Murphy during the IEP process. Moreover, the hearing officer noted that he was "plagued" as to why plaintiff failed to file a due process appeal or to agree to any program offered during the long period when he refused to allow Kevin to attend school. Only when the school district decided to terminate educational services in 1989 did Mr. Murphy initiate suit challenging the appropriateness of his son's 1981-83 placement.

In an effort to reach a "bounded, independent decision," this court has reviewed the voluminous record in this case, and shares the same frustrations as the hearing officer. It is

evident from the serial correspondences between Mr. Murphy and Timberlane between September 8, 1981, and November 12, 1982, that he vigilantly believed Kevin's placement for the 1981-82 school year was "unlawful" and that his consent for that placement was obtained "fraudulently". *See, e.g.*, SD Exhibits SJ 8, 12, 13, 15, 20, 21, 22, 23, 25, and 26. Although plaintiff could have exercised his right to challenge this placement anytime after 1981, Mr. Murphy did not. Despite the district's diligent attempts to understand the reasons why Mr. Murphy kept Kevin from attending school for so long and to receive input from Mr. Murphy in developing an interim IEP for Kevin that would be acceptable to Mr. Murphy, such efforts repeatedly proved to be futile. *See, e.g.*, Transcript of Sept. 8, 1982, team meeting at 39, 63, 70, 74, 83; Transcript of September 13, 1982, team meeting at 28, 31, 35. Again, assuming Mr. Murphy believed any attempts to construct an IEP for 1982-83 were improperly developed and that he was not given an opportunity to be heard during the process, he did nothing to enforce those rights.

In their objection to defendant's motion for summary judgment, plaintiffs make essentially two arguments with respect to laches. First, they assert that laches should not apply because Kevin, as the real party in interest, should not be faulted for his parents' lack of cooperation. Second, they contend that Kevin's parents, at least with respect to their efforts as of January 1983, when Mr. Wright was appointed as mediator, were fully cooperative. The court rejects plaintiffs' first argument as meritless. To the extent the parents, throughout the educational process and now as legal guardians of their son, are Kevin's agents, it is only their actions as "parties" in an EAHCA case that are reviewable by the court. *See* 20 U.S.C. § 1415(b)(2); *Burlington II, supra*, 736 F.2d at 799; *Doe by Doe* v. *Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990).

Even if, as Mr. Wright attests, plaintiffs were cooperative and far from "obstructionist" with the pupil placement team

between 1983 and 1989, Plaintiffs' Memorandum of Law in Support of Objection to Motion for Summary Judgment, Exhibit A at 1, this does not justify Mr. Murphy's obstinacy before that time, 1981-83, which is the critical time period here at issue. In short, keeping Keven out of school for two years, yet waiting six or more years before seeking compensatory relief in this case, was, in this court's view, an unreasonable delay.

The court next must determine whether such delay caused any prejudice to the defendant. The hearing officer found that following factors significant. Because the student is now over twenty-one years of age, the State will not reimburse the district for any compensatory education, SD Exhibit SJ 112; memories of witnesses from the 1981-83 period have faded and are likely to be highly unreliable and contradictory, particularly in a case like this one which has been fueled by such animosity; and the evidence is stale. Defendant also indicates that most of the principal actors from the 1981-83 period have left the jurisdiction of Timberlane. *See* Defendant's Memorandum in Support of Motion for Summary Judgment at 20-21. Moreover, in light of the highly unusual posture of this case, no stay-put provision is in place, and Kevin has been out of the publicly funded educational system since 1989. Based on these consequences, it is clear that the Murphys' unreasonable delay caused prejudice to Timberlane. Accordingly, the court finds that plaintiffs' claims are barred by laches.[9]

[9] Because the court finds laches to bar plaintiffs' appeal, it need not address defendant's statute of limitations arguments.

Conclusion.

For the reasons stated hereinabove, defendant's motion for summary judgment (document No. 16) is granted.

SO ORDERED.

So ordered,

/s/Shane Devine
Chief Judge
United States District Court

August 26, 1991

APPENDIX D.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Kevin W. Murphy, by and through
his legal guardians, Kevin C.
and Janice Murphy

v. Civil No. 90-265-D

Timberlane Regional School District

JUDGMENT

In accordance with Chief Judge Shane Devine's order of August 26, 1991, judgment is hereby entered.

By the Court,

_____

Clerk

August 26, 1991

cc: Michael R. Chamberlain, Esq.
Gerald M. Zelin, Esq.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KEVIN W. MURPHY, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

TIMBERLANE REGIONAL SCHOOL DISTRICT,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Shane Devine, U.S. District Judge]

Cyr, Circuit Judge,
Roney,* Senior Circuit Judge,
and Pieras,** District Judge.

Michael R. Chamberlain with whom *Chamberlain and Connor* were on brief for appellants.

Diane M. Gorrow with whom *Gerald M. Zelin* and *Soule, Leslie, Zelin, Sayward and Loughman* were on brief for appellee.

August 19, 1992

---

* Of the Eleventh Circuit, sitting by designation.
** Of the District of Puerto Rico, sitting by designation.

Roney, *Senior Circuit Judge:* This case arises under the Individuals with Disabilities Education Act (Act), 20 U.S.C. § 1400 *et seq*. Kevin W. Murphy, along with his parents and guardians, Janice and Kevin C. Murphy, are seeking compensatory education for a two-year period during which Kevin received no special education services. Both the administrative hearing officer and the United States District Court for the District of New Hampshire entered orders for defendant Timberlane Regional School District, ruling by way barred by laches. Since the parents' delay in filing suit was not unreasonable and factual disputes remain concerning the school district's claim of prejudice, we vacate and remand to the district court for further proceedings..

The Act requires that to qualify for federal financial assistance, participating states must adopt policies assuring all students with disabilities the right to a "free appropriate public education." 20 U.S.C. § 1412(1). New Hampshire has adopted the required policies and attempts to comply with the requirements of the Act.

As defined by the Act, the term "free appropriate public education" refers to the special education and related services that must be provided in conformity with an individualized education program (IEP). 20 U.S.C. § 1401(a)(20). An IEP is a statement of the educational program which must be written for each child and designed to meet each child's unique needs. 20 U.S.C. § 1401(a)(19). The IEP is developed by a team including a qualified representative of the local educational agency, the teacher, the parents or guardian, and, where appropriate, the student. Id. In New Hampshire, this team is referred to as the Pupil Placement Team. The IEP must be reviewed at least annually and reviserd when necessary. 20 U.S.C. § 1414(a)(5). An IEP is appropriate under the Act if it provides instruction and support services which are reasonably calculated to confer educational benefits to the student. *Board of*

Education v. *Rowley*, 458 U.S. 176, 203-07 (1982); *Abrahamson* v. *Hershman*, 701 F2d. 223, 226-27 (1st Cir. 1983).

The Act further requires states to establish and maintain certain procedures "to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Parents who believe that a proposed IEP is inappropriate are entitled to an impartial due process hearing. 20 U.S.C. § 1415(b)(2). Any party aggrieved by the decision of the administrative hearing officer may appeal to either state of federal court. 20 U.S.C. § 1415(e)(2).

Kevin W. Murphy was born on July 9, 1968. He is a disabled individual who is entitled to special education services under the Act. Kevin's disabilities include spastic paraplegia, cortical blindness (difficulty processing visual stimuli), tactile agnosia (difficulty processing tactile input), and mild mental retardation.

In 1976, the Murphys moved to Plaistow, New Hampshire, which is in the Timberlane Regional School District (Timberlane or the district). In September 1981, Kevin was transferred from his previous placement to a special program at Charlotte Avenue School, a public elementary school in Nashua, New Hampshire. Although Kevin's parents had originally agreed to this new placement, they soon became concerned about the appropriateness of the placement, and expressed their objections to Kevin's teacher and to Timberlane's special education administrators. In December 1981 Kevin suffered a seizure at home, and his parents decided not to return Kevin to school after the winter break.

In January 1982 the school superintendent authorized the director of special education to provide tutorial services to Kevin in his home. A year later, the State Department of Education strongly recommended that the director provide Kevin with home-based instruction. No such services were ever provided.

Mr. Murphy wrote letters to Timberlane in January and February 1982, notifying the school district of his decision to keep Kevin at home, complaining that Kevin was being denied and education, and threatening to bring an action against the district. Kevin remained at home throughout 1982 and 1983.

Between January 1982 and January 1984, numerous IEP meetings were held between Kevin's parents and district officials in an attempt to develop an appropriate program for Kevin. Although the parties' accounts of the facts differ on who was cooperative and who was obstinate, it is clear that there were a number of disagreements over the appropriateness of different proposed placements and evaluations. The Murphys rejected a number of IEPs presented to them by the district. In June 1982, Kevin attended school in a third grade classroom for the last two weeks of the school year. The purpose of this placement was to allow Timberlane an opportunity to evaluate Kevin and assess his needs so that an appropriate IEP could be developed for the following school year.

In November 1982, the district initiated truancy proceedings against Kevin's parents because of Kevin's absence from school. These proceedings were never completed. In January 1984, the Pupil Placement Team finally agreed on a placement for Kevin in the Get Set Program at Pinkerton High School. Although Kevin's May 1985 IEP indicated that Kevin might complete the Get Set Program as early as June 1987, Kevin remained in the program through the end of 1988-89 school year.

In May 1988, Kevin's Pupil Placement Team met to develop an IEP for the 1988-89 school year. Although Kevin would turn21 in July 1989, there was evidence that the Team assumed that this was not the final IEP to be developed for Kevin and that Kevin would be permitted to continue his education until he completed the program at Pinkerton High School. In November 1988, Mr. Murphy met with Timberlane's Superintendent,

Terrance Holmes, to discuss whether Timberlane would provide schooling beyond Kevin's 21st birthday. Mr. Holmes agreed to present Mr. Murphy's request to the School Board. On January 5, 1989, the Superintendent recommended to the School Board that Kevin be allowed to continue at Pinkerton High School beyond his 21st birthday. Board rejected the recommendation by a vote of six to three.

Kevin turned 21 on July 9, 1989. On July 24, 1989, George Wright, Timberlane's local education agency representative and a member of Kevin's IEP team, wrote to Kevin's parents enclosing an Annual Statement of Placement discharging Kevin as a special education student. In August 1989, the Murphys appealed the discharge and requested an administrative hearing. The Murphys sought compensatory education for Kevin beyond the statutorily required age of 21 because of the district's failure to provide special education and related services from January 1982 through January 1984.

On February 27, 1990, an administrative hearing officer denied Timberlane's motion for summary judgment, rejecting the district's laches argument and applying a six-year statute of limitations. Upon the district's motion for reconsideration, the hearing officer reversed himself, and on April 23, 1990, found that laches barred the Murph's claim. The parents appealed to the United States District Court for the District of New Hampshire. On August 26, 1991, that court ruled that compensatory education is available under the Act, but granted summary judgment for the district based on its laches defense. The court denied the Murphy's motion to reconsider and entered its judgment on October 31, 1991.

This circuit has not yet decided whether compensatory education is a permissible form of relief under the Act. Other circuits which have addressed the issue have allowed compensatory education, likening this form of relief to the reimbursement we permitted in *Town of Burlington* v. *Department of Education*, 736 F2d. 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359

(1985). Indeed, according to our research, every circuit which has addressed this issue since our decision in *Burlington* was affirmed by the Supreme Court has found that compensatory education is available under the Act. *See, e.g., Lester H.* v. *Gilhool*, 916 F2d. 865 (3d Cir. 1990), *cert. denied sub nom. Chester Upland Sch. Dist.* v. *Lester H.*, U.S. , 111 S.Ct. 1317 (1991); *Burr* v. *Ambach*, 863 F2d. 1071 (2d Cir.), *vacated and remanded sub nom. Sobol* v. *Burr*, 492 U.S. 902, 109 S.Ct. 3209 (1988), *reaff'd*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, 494 U.S. 1005 (1990); *Jefferson County Bd. of Educ.* v. *Breen*, 800 F.2d 749 (8th Cir. 1986).

Assuming that compensatory education is available in this circuit, it, like reimbursement, is a form of equitable relief. *See Burlington*, 736 F.2d at 799, 801-02; *Jefferson County Bd. of Educ.*, 853 F.2d at 857-58. Thus equitable defenses are available to a claim for compensatory education.

The equitable doctrine of laches is an affirmative defense that serves as a bar to a claim for equitable relief "waher a party's delay in bringing suit was (1) unreasonable, and (2) resulted in prejudice to the opposing party." *K-Mart Corp.* v. *Oriental Plaza, Inc.*, 875 F.2d 907, 911 (1st Cir. 1989). *See Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 215, *reh'g denied*, 374 U.S. 858 (1963).

We reverse the district court's grant of summary judgment on the ground that the claimed is barred by laches for two reasons. *First*, the Murphy's delay in filing their claim was not so unreasonable as to make the laches defense available without a clear showing of prejudice. *Second*, summary judgment was improper because genuine issues of material fact remained concerning Timberlane's assertion of prejudice.

We review the district court's application of laches for abuse of discretion. *K-Mart* v. *Oriental Plaza, Inc.*, 875 F.2d 907, 911 (1st Cir. 1989). The discretion of the district court, however, is confined by established standards. We have been un-

able to find any cases applying the laches doctrine to a claim brought under the Act, indicating that perhaps the doctrine should be applied sparingly to facilitate Congress' policy concerning the education of children with disabilities. *Cf. Park County Resource Council, Inc.* v. *United States Dept. of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987).

The district court found that the Murphys' delay in filing their claim for compensatory education was unreasonable because the parents kept Kevin out of school for two years; failed to cooperate with the school in 1982 and 1983; and waited approximately six years before seeking relief. *Murphy* v. *Timberland Regional Sch. Dist.*, No. 90-265-D at 20-21 (D.N.H. Aug. 26, 1991).

Although the Murphys could have requested a due process hearing in late 1981 when they first felt that the education being provided by Timberlane was in appropriate, they chose instead to negotiate with the school in an attempt to secure an appropriate program for Kevin. The Murphys attended no less than six meetings betwee January and September 1982. Further, although the Pupil Placement Team had not yet agreed on a program for Kevin, the Murphys agreed to allow Kevin to attend school for a short period in June 1982 for the purpose of evaluating Kevin and determining his needs. Obviously, the Murphys were not sitting on their rights, but were attempting to resolve their differences with the school district without resorting to litigation.

Second, the Murphys' delay was not unreasonable because until the summer of 1989, the Murphys were not certain that the school district would end Kevin's education when he reached 21. Although the Act only requires school districts to provide free appropriate public education to students between the ages of 3 and 21, it was not entirely unreasonable for the Murphys to postpone litigation with the hope that Timberlane would voluntarily provide additional education to compensate for Kevin's two years at home.

Third, we are troubled by Timberlane's attempt to fault the Murphys for their failure to file for a due process hearing when, although the parents are entitled to request a hearing if they disagree with IEP, state regulations impose upon Timberlane not only the right, but the *obligation* to do the same. In New Hampshire, if the parents disagree with a proposed IEP and the local educational agency feels it would be in the best interest of the child to implement the IEP, the local agency is required to initiate administrative procedures to obtain permission from a hearing officer to implement the IEP. N.H. Code Admin. R. Ed. 1125.01(b)(3)-b.[1] No such procedures were ever initiated by Timberlane.

Finally, in what appears to be an attempt to persuade the court that the Murphys' delay in filing their claim was unreasonable, Timberlane has set forth in detail what it describes as the Murphys' obstructionism and obstinacy. While obstinacy on the part of the parents may be relevant to entitlement to relief and when fashioning the remedy, it has little to do with the doctrine of laches.

Even if the Murphys' delay had been unreasonable, however, the laches issue should not have been resolved on summary judgment. In reviewing the district court's grant of summary judgment, we should reverse "if we find that 'issues of fact which were adequately raised before the district court need to be resolved before the legal issues in the case may be decid-

---

[1] If the parent(s) inform the district of their disagreement, or if they failed to make a decision within a specified time frame, it shall be interpreted as disagreement with the decision or action proposed by the local school district's Special Education Evaluation/Placement Team. If the Local Education Agency feels its action or decision should, in the best interests of the student, be implemented, the Local Education Agency shall initiate its right of due process as specified in the *Complaint and Impartial Due Process Hearing Procedures* Section of the *Standards* to obtain the authority to implement its decision.

N.H. Code Admin. R. Ed. 1125.01(b)(3)-b.

ed.' " *Lipsett* v. *Univeristy of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988) (quoting *Greenburg* v. *Puerto Rico Maritime Shipping Auth.*, 835 F.2d 932, 934 (1st Cir. 1987)).

The district court's conclusion that the Murphys' delay in filing their claim prejudiced Timberlane was based on the following: because Kevin is now over 21 years of age, the state will not reimburse Timberlane for the costs associated with compensatory education; memories of witnesses from the 1981-83 period have faded; most of the principal actors from the 1981-83 period have left the jurisdiction of Timberlane; and in light of the posture of this case, no stay-put provision was in place, and Kevin has been out of any publicly funded educational system since 1989.

The circumstances cited by the district court do not provide a showing of prejudice sufficient to support summary judgment on the basis of laches. The laches doctrine may be invoked only where the prejudice to the defendant flows from the plaintiff's delay. *See Gutierrez* v. *Waterman Steamship Co.*, 373 U.S. 206, 215-16, *reh'g denied*, 374 U.S. 858 (1963); *Puerto Rican-American Ins. Co.* v. *Benjamin Shipping Co.*, 829 F.2d 281, 284 (1st Cir. 1987); *Cruz* v. *Hauck*, 762 F.2d 1230, 1238 (5th Cir. 1985). Two of the factors relied on by the district court have nothing to do with the Murphys' delay in filing their claim. Although it may be true that the state would not contribute to Timberlane's expenditures on compensatory education, that hardship is not attributable to the parents' delay. If the Murphys had sought and received a compensatory education award in 1984, Timberlane would still be required to bear the cost without assistance from the state. Similarly, any prejudice to Timberlane that might result from the fact that Kevin has been out of school throughout the course of these proceedings is not attributable to the parents' delay.

The two remaining factors upon which the district court relied also do not support a grant of summary judgment. First,

there was no evidence before the district court that the memories of witnesses had failed. Second, the district court's finding that key witnesses were unavailable was premature. Timberlane measures unavailability by reference to the subpoena power of the administrative agency. Although it may be true that the hearing officer could not have compelled the attendance of some of these witnesses, the subpoena power of federal courts is not as limited. *See* Fed. R. Civ. P. 45(b). There was no showing that the presence of these witnesses could not have been compelled by the district court or that the key witnesses are actually unavailable even if they are beyond the court's subpoena power. Although Timberlane identified four principal actors which it claimed were unavailable, the Murphys point to evidence in the record calling into doubt the school's assertion of unavailability. In light of these unresolved issues of fact, the district court's grant of summary judgment to Timberlane must be set aside. *See Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

Vacated and Remanded.

APPENDIX F.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

KEVIN W. MURPHY, ET AL.

v. Civil No. 90-265-D

TIMBERLANE REGIONAL
SCHOOL DISTRICT

ORDER

Without acknowledging its intentions with regard to its forthcoming rulings on (1) the laches issue and (2) defendant's "Motion For Summary Judgment To Dismiss The Murphys' Compensatory Education Claim As Untimely Under The Statute Of Limitation", the court hereby gives notice to the parties that if it determines that the plaintiff should prevail with respect to the aforementioned rulings, the court will then consider the possibility of issuing said rulings in a single order, which may include one of the following: (1) entry of summary judgment for plaintiffs based on the merits of plaintiff's claims in the instant action; or (2) entry of summary judgment for defendants based on the merits of plaintiff's claims in the instant action.

Accordingly, the court orders the parties to submit within ten (10) days of this order any memorandum of law and/or evidence which might be relevant to said consideration.

SO ORDERED.

Shane Devine, Senior Judge
United States District Court

March 16, 1993

cc: Michael R. Chamberlain, Esq.
Diane M. Gorrow, Esq.

Gerald M. Zelin, Esq.
Soule, Leslie, Zelin, Sayward & Loughman
220 Main Street
Salem, NH 03079

APPENDIX G.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Kevin W. Murphy, by and through
his legal guardians,
Kevin C. and Janice Murphy

v. Civil No. 90-265-SD

TIMBERLANE REGIONAL SCHOOL DISTRICT

ORDER

Plaintiff Kevin W. Murphy, by and through his parents and legal guardians Kevin C. Murphy and Janice Murphy, brings this action on appeal from a hearing officer's decision pursuant to the Individuals with Disabilities Act (codified at 20 U.S.C. §-1400, *et seq*. (1990 & Supp. 1993), formerly the Education of the Handicapped Act, formerly the Education for All Handicapped Children Act) ("Act"), 20 U.S.C. § 1415 (1990 & Supp. 1993). Kevin seeks an award of compensatory education fo the period between January 1, 1982, and December 31, 1983, during which defendant Timberlane Regional School District allegedly denied him special education services. In addition, Kevin seeks relief under 42 U.S.C. §§ 1983 and 1988 to secure his rights under the Act. The court has jurisdiction of this action under 20 U.S.C. § 1415 (1990 & Supp. 1993), 28 U.S.C. §§ 1331 (Supp. 1993) and 1343 (Supp. 1993), and 42 U.S.C. §§ 1983 and 1988 (Supp. 1993).

For a recitation of the factual background of this case, *see* *Murphy* v. *Timberlane Regional School District*, 973 F.2d 13 (1st Cir. 1992).

In its order of August 26, 1981, this court granted defendant's April 1, 1991, motion for summary judgment based on a finding that plaintiff's claims were barred by the equitable defense of laches. Said order was vacated and remanded by the First Circuit Court of Appeals in *Murphy* v. *Timberlane, supra*. Pursuant to the First Circuit's opinion, this court held a hearing on the laches issues on January 28, 1993.

Presently before the court are (1) defendant's original motion for summary judgment dated April 1, 1991; (2) defendant's February 18, 1993, motion for summary judgment to dismiss the Murphys' compensatory education claims as untimely under the statute of limitations; and (3) plaintiff's motion for summary judgment, filed on April 9, 1993.

I. The Statute of Limitations Issue

a. *Defendant's Argument*

Defendant concedes that

> [a]t the time this case arose, neither the IDEA nor RSA [New Hampshire Revised Statutes Annotated] 186-C[1] contained a statute of limitations for requesting an administrative hearing or for seeking judicial review of the hearing officer's decision.

Memorandum of Law in Support of School District's Motion to Dismiss the Murphys' Compensatory Education Claim as Untimely Under the Statute of Limitations ("Defendant's Memo on Statute of Limitations") at 17. However, defendant contends that the court should fill this gap by following " 'the settled practice' " of " 'adopt[ing] a local limitation as federal law *if it is not inconsistent with federal law or policy to do*

[1] RSA 186-C implements the Act. *See Timothy W.* v. *Rochester, N.H., School District*, 875 F.2d 954, 973 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (1989).

so.'" *Id.* at 17-18 (quoting *Wilson* v. *Garcia*, 471 U.S. 261, 266-67 (1985)) (emphasis added).

Accordingly, defendant contends that the court must choose between RSA 507-B:7, which provided a limitations period of four years from the time the cause of action accrued on "Bodily Injury Actions Against Governmental Units" during the period from August 22, 1981, through May 17, 1989,[2] and RSA 50:4 I, which provided a limitations period of six years from the time the cause of action accrued on "all personal actions, except actions for slander or libel," "[e]xcept as otherwise provided by law," during the period from August 28, 1981, through July 1, 1986.[3] *See* Defendant's Memo on Statute of Limitations at 18. Defendant "urges the court to borrow the shorter statute, RSA 507-B:7," contending that "it is more consistent with the policies underlying the IDEA." *Id.*

Defendant contends that "[a] cause of action under the IDEA accrues 'when parents know or have reason to know of the injury or event that is the basis for their claim,'" *id.* at 35 (quoting *Hall* v. *Knott County Bd. of Educ.*, 941 F.2d 402, 408 (6th Cir. 1991)), *cert. denied*, ___ U.S. ___, 112 S.Ct. 982 (1992). To support its interpretation of *Hall*, defendant cites *McDowell* v. *Fort Bend Indep. School Dist.*, 737 F.Supp. 386 (S.D. Texas 1990), for the proposition that "[t]he plaintiff must be in possession of 'critical facts' which indicate that he has been hurt and that the defendants are responsible for this injury." Defendant's Memo on Statute of Limitations at 35 (citing *McDowell* at 389). Defendant contends that, based on *Hall* and *McDowell*, the court must find that plaintiff's compensatory education claim "accrued when Kevin was out of school," *id.*, which defendant characterizes as "between January 1982 and October 1983," *id.*

---

[2] *See* RSA 507-B:7 (Supp. 1991), establishing a three-year limitations period.

[3] *See* RSA 508:4 I (Supp. 1991), establishing a three-year limitations period.

Plaintiff did not seek a due process hearing until August 22, 1989. Therefore, if the court were to accept defendant's reasoning in its entirety, it would conclude that the plaintiff's action is barred by RSA 507:B-7.

b. *Defendant's Breach of a "Procedural Safeguard"*

As the First Circuit recognized in its opinion, during the period of the Murphys' dispute with Timberlane over the propriety of the 1981-82 IEP, Timberland was bound by N.H. Code Admin. R. Ed. 1125.01(b)(3)-b (Aug. 1981),[4] pursuant to which it was "required to initiate administrative procedures to obtain permission from a hearing officer to implement the IEP." *Murphy*, 973 F.2d at 17. As the First Circuit noted, "No such procedures were ever initiated by Timberlane." *Id.*

The promulgation of Rule Ed. 1125.01(b)(3)-b was authorized pursuant to 20 U.S.C. § 1415(a), which provided:

> Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section *to assure that handicapped children and their parents*

[4] Rule 1125.01(b)(3)-b provided:

> If the parent[s] inform the district of their disagreement, or if they fail to make a decision within the specified time frame, it shall be interpreted as disagreement with the decision or action proposed by the local school district's Special Education Evaluation/Placement Team. If the Local Education Agency feels its action or decision should, in the best interests of the child, be implemented, the Local Education Agency shall initiate its right of due process as specified in the *Complaint and Impartial Due Process Hearing Procedures Section* of these *Standards* to obtain the authority to implement its decision.

This rule is currently designated as N.H. Code Admin. R. Ed. 1125.01(b)(3)(C).

> *or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate education by such agencies and units.*

(Emphasis added.) Further, the stated purpose of the Act was

> to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B)[5] of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1400(c).[6] In light of the above, the court concludes that Rule Ed. 1125.01(b)(3)-b constituted a "procedural safeguard[]", 20 U.S.C. § 1415(a), embodying the Act's purpose of "assur[ing] that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education. . . ." 20 U.S.C. § 1400(c). Had Timberlane complied with this procedural safeguard, it would have initiated the same administrative hearing and judicial review process it now seeks to nullify by invoking RSA 507-B:7. *See and compare* Rule Ed. 1125.01(b)(e)-b (quoted *supra*) *with* N.H. Code Admin. R. ch. Ed. 1127 (Aug. 1981) *and* 20 U.S.C. § 1415(b).

---

[5] In conjunction with RSA 186-C:9, section 1412(2)(B) entitled Kevin to receive education services until age 21 or the date of his graduation from high school.

[6] Congress has amended the above-quoted sections by substituting "children with disabilities" for "handicapped children". *See* 20 U.S.C. § 1415(a) (Supp. 1993) *and* § 1400(c) (Supp. 1993).

In its opinion, the First Circuit found that the failure to comply with Rule 1125.01(b)(3)-b diminished Timberlane's standing in equity to invoke the defense of laches. *Murphy* v. *Timberlane*, *supra*, 973 F.2d at 17. Specifically, that court stated:

> [W]e are troubled by Timberlane's attempt to fault the Murphys for their failure to file for a due process hearing when, although the parents are entitled to request a hearing if they disagree with an IEP, state regulations impose upon Timberlane not only the right, but the *obligation* to do the same.

*Id.*f (emphasis in original).

This court is equally troubled by Timberlane's current attempt to capitalize on its own failure to comply with the Act, as reinforced by New Hampshire law, at the expense of both Kevin and the legislative goals underlying the Act. In particular, the court notes that, rather than complying with Rule 1125.01(b)(3)-b and implementing the putatively appropriate IEPs in question, Timberlane has sought only to ensure that no hearin5g on the merits of this case ever takes place. Clearly, the procedural safeguards of section 1415 and its progeny in the form of Rule Ed. 1125.01(b)(3)-b were intended to thwart such behavior and to prevent the occurrence of situations such as this, where more than decade has passed since the initial IEP dispute, while the merits of that dispute still remain unaddressed.

In *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983), the Supreme Court, in addressing the appropriate limitations period for suits brought under both section 301 of the Labor Management Relations Act and the National Labor Relations Act, discussed its general approach to the issue of applying state statutes of limitations to actions brought under federal law:

As is often the case in federal civil law, there is no federal statute of limitations expressly applicable to this suit. In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law. 'The implied absorption of State statutes of limitations within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles.' *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).

In some circumstances, however, state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.

> "[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclu-

> sive guide.'" *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977) (quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975)).
>
> *Hence, in some cases we have declined to borrow state statutes but have instead used timeliness rules drawn from federal law — either express limitations periods from related federal statutes, or such alternatives as laches.*

Id., 462 U.S. at 158-62 (footnotes and citations omitted) (emphasis added).

Because "compensatory education . . . is a form of equitable relief," *Murphy* v. *Timberlane, supra*, 973 F.2d at 16, this court is further guided by the Supreme Court's opinion in *Holmberg* v. *Armbrecht, supra*, in which the Court addressed the appropriate limitations period on a suit in equity under section 16 of the Federal Farm Loan Act.

> The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. . . . We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

> Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair.

Id., 327 U.S. at 395-96 (citations omitted). In light of the foregoing, as well as the Supreme Court's admonition that

> [e]quity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties.'

Id. at 396 (quoting *Galliher* v. *Cadwell*, 145 U.S. 368, 373 (1892)), and bearing in mind that the First Circuit in its opinion held the equitable defense of laches to be "available to a claim for compensatory education," *Murphy* v. *Timberlane, supra*, 973 F.2d at 16, this court finds that under the circumstances of the instant case, the application of the doctrine of laches is an appropriate alternative to the borrowing of a "mechanical" state statute of limitations that would exert an effect contrary to the design and purposes of the federal statute at issue.

Therefore, the courts resolution of defendant's motion for summary judgment, based on the statute of limitations issue, depends upon its determination as to whether or not defendant should prevail in its assertion of laches.

II. The Laches Issue

In its opinion, the First Circuit held that "the Murphys' delay in filing their claim was *not so unreasonable as to make the laches defense available without a clear showing of prejudice*." *Murphy* v. *Timberlane, supra*, 973 F.2d at 16 (emphasis added). The court provided the following assessment of the evidence upon which this court had based its finding of prejudice:

> The district court's conclusion that the Murphys' delay in filing the claim prejudiced Timberlane was based on the following: because Kevin is now over 21 years of age, the state will not reimburse Timberlane for the costs associated with compensatory education; memories of witnesses from the 1981-83 period have faded; most of the principal actors from the 1981-83 period have left the jurisdiction of Timberlane; and in light of the posture of this case, no stay-put provision was in place, and Kevin has been out of any publicly funded educational system since 1989.
>
> The circumstances cited by the district court do not provide a showing of prejudice sufficient to support summary judgment on the basis of laches. *The laches doctrine may be invoked only where the prejudice to the defendant flows from the plaintiff s delay. See Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 215-16, 83 S.Ct. 1185, 1191-92, 10 L.Ed.2d 297 *reh'g denied*, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082 (1963); *Puerto Rican-American Ins. Co.* v. *Benjamin Shipping Co.*, 829 F.2d 281, 284 (1st Cir. 1987); *Cruz* v. *Hauck*, 762 F.2d 1230, 1238 (5th Cir. 1985). Two of the factors relied

> on by the district court have nothing to do with the Murphys' delay in filing their claim. Although it may be true that the state would not contribute to Timberlane's expenditures on compensatory education, that hardship is not attributable to the parents' delay. If the Murphys had sought and received a compensatory education award in 1984, Timberlane would still be required to bear the cost without assistance from the state. Similarly, any prejudice to Timberlane that might result from the fact that Kevin has been out of school throughout the course of these proceedings is not attributable to the parents' delay.
>
> The two remaining factors upon which the district court relied also do not support a grant of summary judgment. *First, there was no evidence before the district court that the memories of witnesses had failed. Second, the district court's finding that key witnesses were unavailable was premature.*

Murphy v. *Timberlane*, *supra*, 973 F.2d 17-18 (emphasis added).

In light of the above, the court concludes that the only remaining issues of prejudice are (1) whether key witnesses are unavailable and (2) whether the memories of witnesses have failed. The court's findings with respect to these issues must be "bas[ed] . . . on the preponderance of the evidence." 20 U.S.C. § 1415(e)(2).

a. *Unavailability of "Principal Actors"*

In its original Memorandum of Law in Support of the School District's Request for Summary Judgment ("Defendant's Original Memo"), defendant contended that it "ha[d] been prejudiced . . . by the Murphys' failure to request an administrative

hearing at an earlier date" in part because "most of the principal actors from that period are gone." Defendant's Original Memo at 19-20. Defendant then listed as "gone" the following individuals: "Robert Crompton, Timberlane's Superintendent of Schools at that time . . .; Nickolas [*sic*] Sarbanis (Timberlane's Director of Special Education from 1981 through 1985); Martha Kadel (who taught Kevin at Pollard School before September 1981 and during the spring of 1982) and Claudia Libis (the teacher of the blind at Pollard School during the 1982-83 school year. . . ." Defendant's Original Memo at 21.

Bearing in mind that (1) Claudia Libis and Martha Kadel appeared as witnesses at the January hearing; (2) defendant does not now contend that Nicholas Sarbanis is unavailable, Timberlane Regional School District's Trial Memorandum on Laches at 9; and (3) while defendant describes Robert Crompton as being "beyond state subpoena power," *id.* at 8, it has failed to demonstrate that a subpoena would be required to obtain Mr. Crompton's presence at any proceeding regarding the instant case, the court finds, based on the preponderance of the evidence, that defendant has failed to demonstrate the unavailability of key witnesses.

b. *"Failed Memories" of Witnesses*

Defendant contends that it "has been prejudiced because the memories of critical witnesses have faded." Timberlane Regional School District's Trial Memorandum on Laches at 9. Defendant identifies these "critical witnesses" as "Kathy Downes, Kevin's primary teacher in Nashua during 1981-82," *id.*; "Gail Barringer, Nashua's special education director for the past 19 years," *id.* at 10-11; "Terry Lemaire, the current assistant special education director in Nashua [who] in 1981-1982 co-taught with Kathy Downes Kevin's class at Charlotte Avenue," *id.* at 11; "Robert Cote who attended the meeting to develop Kevin's Nashua IEP," *id.*; "Tom Caron, the prin-

cipal of the Pollard School for 27 years and a member of Kevin's special education team," *id.* at 12; "Claudia Libis," *id.*; and "Jean Parsons, Kevin's occupational therapist from 1979-1981 at the same time that Kevin was in Martha Kadel's class," *id.*

Robert Cote's testimony at the January hearing revealed that he was not a significant participant in Kevin's special education program. Therefore, the quality of Mr. Cote's memory of the instant matter is irrelevant as to the issue of prejudice.

At the January hearing, Kathy Downes, Gail Barringer, Terry Lemaire, Tom Caron, Claudia Libis, and Jean Parsons each testified on defendant's direct examination as to aspects of their involvement with Kevin's special education program which they could not remember. On plaintiff's cross-examination, however, each acknowledged that defendant had not shown them relevant documents contained in the record of the instant case,[7] such as transcripts of significant meetings concerning Kevin. Defendant's failure to make a reasonable effort to revive the memories of these witnesses casts doubt upon the validity of its contention that said memories have failed.[8] Meanwhile, plaintiff's witness Martha Kadel, cited by defendant as a "principal actor" in the instant matter, testified in detail about her involvement with Kevin's special education program without showing signs that her memory of the instant matter had failed.

Accordingly, the court finds, based on the preponderance of the evidence, that defendant has failed to demonstrate that any of its relevant witnesses suffer from failed memories.

---

[7] For example, Terry Lemaire, who on direct examination stated that she did not recognize a document identified as an IEP, acknowledged on cross-examination that defendant had not shown her the document prior to the hearing.

[8] The court notes that when plaintiff's counsel showed Claudia Libis a transcript of a September 1982 meeting, the witness, cited by defendant as a "principal actor" in the instant matter, acknowledged a clear recollection of a matter contained therein.

In light of the foregoing, and based on the preponderance of the evidence, the court finds that defendant has failed to make "a clear showing of prejudice" sufficient to justify a finding of laches. Therefore, defendant's original motion for summary judgment and defendant's motion for summary judgment based on the statute of limitations issue are denied.

III. Plaintiff's Motion for Summary Judgment on the Merits

a. *Defendant's Rule 56(f) Argument*

On March 16, 1993, this court notified the parties that it was considering the entry of summary judgment on the merits of plaintiff's claims in the instant action, and ordered them to submit within ten days of any memoranda of law or evidence which might be relevant to said consideration. On March 23, 1993, the clerk of court granted defendant's unobjected-to motion to postpone the deadline for filing memoranda of law and/ or evidence to April 9, 1993.

Defendant contends that the court should "allos the school district the opportunity to conduct discovery before this court rules on the merits by way of summary judgment" because "[t]he school district must have an opportunity to conduct discovery to reconstruct th[e] chronology [of Kevin's education] and to fill in critical gaps about events which occurred before, during, and after the years in question." Memoranda of Law in Support of Objection to Motion for Summary Judgment ("Defendant's Objection Memo") at 2-3. *See also* Timberlane's Memorandum of Law pursuant to the March 16, 1993, Order ("Defendant's Memo Pursuant to Order") at 1-5. Defendant invokes Rule 56(f) in support of its contention. *Id.* at 2.

Rule 56(f), Fed. R. Civ. P., provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Defendant contents,

> [A]s the testimony at the laches hearing amply demonstrated, essential school district witnesses could not recall key events in the chronology of Kevin's education. The school district must have an opportunity to conduct discovery to reconstruct that chronology and to fill in critical gaps about events which occurred before, during, and after the years in question.

Defendant's Memo Pursuant to Order at 4-5. Defendant offers no further justification for its contention that discovery is necessary to reconstruct the chronology of Kevin's education. Therefore, bearing in mind the court's finding that defendant has failed to demonstrate by a preponderance of the evidence that any of its relevant witnesses suffer from failed memories, the court concludes that the evidence contained in said memories was available to defendant when it prepared its responses to plaintiff's motion for summary judgment. Accordingly, the court finds that defendant has failed to demonstrate that it "cannot . . . present by affidavit facts essential to justify [its] opposition" to plaintiff's motion for summary judgment. Rule 56(f).

b. *Defendant's Objection to Documents*

Defendant contends that in deciding plaintiff's motion for summary judgment, the court should not consider "new documents by Drs. Packard, Cusha and the Perkins School" attached to Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment ("Plaintiff's Summary Judgment Memo") as exhibits, Defendant's Objection Memo at 4, because "some of these documents are not in affidavit form as required by Rule 56(e)," *id.*, and "[s]ome of those documents are old records which should have been produced earlier," *id.* at 5. Because the court is able to resolve the instant motion without considering those particular documents it does not address defendant's objections to same.

c. *Summary Judgment Standard*

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.

> In assessing whether a dispute is material, the district court must look to the substantive law of the case, for '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'

Lipsett v. *University of Puerto Rico*, 864 F.2d 881, 894 (1st Cir. 1988) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

d. *Plaintiff's Compensatory Education Claim*

This court has previously held "that compensatory education is an available form of relief under the Act." *Manchester School Dist.* v. *Christopher B.*, 807 F.Supp. 860, 867-88 (D.N.H. 1992) (citing *Burlington School Comm.* v. *Department of Educ.*, 471 U.S. 359 (1985), *aff'g*, *Town of Burlington* v. *Department of Educ.*, 736 F.2d 773 (1st Cir. 1984); *Lester H.* v. *Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied sub nom.*, *Chester Upland Sch. Dist.* v. *Lester H.*, ___ U.S. ___, 111 S.Ct. 1317 (1991); *Burr* v. *Ambach*, 863 F.2d 1071 (2d Cir.), *vacated and remanded sub nom.*, *Sobol* v. *Burr*, 492 U.S. 902 (1988), *reaff'd*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, 494 U.S. 1005 (1990); *Jefferson County Bd. of Educ.* v. *Breen*, 853 F.2d 853 (11th Cir. 1988); *Miener* v. *Missouri*, 800 F.2d 749 (8th Cir. 1986); *Hall* v. *Knott County Bd. of Educ.*, *supra*, 941 F.2d at 407 (action barred by applicable statute of limitations)).

In *Burlington School Committee*, the Supreme Court held that section 1415 authorizes reimbursement of parents "for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IE, is proper under the Act." *Id.*, 471 U.S. at 369. "Like the retroactive reimbursement in *Burlington*, imposing liability for compensatory educational services on the [responsible government entities] 'merely requires [them] to belatedly pay expenses that [they] should have paid all along,' [471 U.S. at 370-71]." *Miener* v. *Missouri*, *supra*, 800 F.2d at 753. "Compensatory education, like retroactive reimbursement, is necessary to preserve a [disabled] child's right to a free education. . . . [P]roviding a compensatory education should serve as a deterrent against states[']unnecessarily prolonging litigation in order to decrease their potential liability." *Jefferson*, *supra*, 853 F.2d at 857-58.

In its opinion, the First Circuit found, *inter alia*, the following:

> In September 1981, Kevin was transferred from his previous placement to a special program at Charlotte Avenue School, a public elementary school in Nashua, New Hampshire. Although Kevin's parents had originally agreed to this new placement, they soon became concerned about the appropriateness of the placement, and expressed their objections to Kevin's teacher and to Timberlane's special education administrators. In December 1981, Kevin suffered a seizure at home, and his parents decided not to return Kevin to school after the winter break.
>
> In January 1982, the school superintendent authorized the director of special education to provide tutorial services to Kevin in his home. A year later, the State Department of Education strongly recommended that the district provide Kevin with home-based instruction. No such services were ever provided.
>
> Mr. Murphy wrote letters to Timberlane in January and February 1982, notifying the school district of his decision to keep Kevin at home, complaining that Kevin was being denied an education, and threatening to bring an action against the district. Kevin remained at home throughout 1982 and 1983.

Murphy v. *Timberlane*, *supra*, 973 F.2d at 14-15.

The First Circuit concluded,

> Although the Murphys could have requested a due process hearing in late 1981 when they first felt that

> the education being provided by Timberlane was inappropriate, they chose instead to negotiate with the school in an attempt to secure an appropriate program for Kevin. The Murphys attended no less than six meetings between January and September 1982. Further, although the pupil placement Team had not yet agreed on a program for Kevin, the Murphys agreed to allow Kevin to attend school for a short period in June 1982 for the purpose of evaluating Kevin and determining his needs. Obviously, the Murphys were not sitting on their rights, but were attempting to resolve their differences with the school district without resorting to litigation.

Id. at 16.

In light of the foregoing, bearing in mind defendant's breach of it duty under Rule 1125.01(b)(3)-b, and based on the evidence before it, the court finds that there is no genuine issue regarding the fact that defendant failed to provide Kevin with a free, appropriate public education during 1982 and 1983, years in which he was entitled to such under the Act.

Accordingly, because an award of compensatory education is an appropriate "response" to a local education authority's "failure to provide an appropriate education," *Jefferson County Bd. of Educ., supra*, 853 F.2d at 857, plaintiff's motion for summary judgment is granted, and the court orders defendant to provide Kevin with two years of compensatory education beginning at the commencement of the school year which starts in September 1993. Kevin's program for each of the two years is to be determined according to the IEP procedures set forth in the Act of 20 U.S.C. § 1401(a)(20) (Supp. 1993). Delays in this process resulting from bad faith on the part of either party will be addressed using the full range of equitable powers available to the court.

Conclusion.

For the reasons stated herein, the court (1) denies defendant's original motion for summary judgment, (2) denies defendant's motion for summary judgment based on the statute of limitations issue, and (3) grants plaintiff's motion for summary judgment. Any requests for findings and rulings not hereinabove specifically or inferentially granted are herewith denied.

SO ORDERED.

Shane Devine, Senior Judge
United States District Court

May 10, 1993

cc: Michael Chamberlain, Esq.
Gerald Zelin, Esq.

APPENDIX H.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1828

KEVIN W. MURPHY, ETC., ET AL.,
PLAINTIFFS-APPELLEES,

v.

TIMBERLANE REGIONAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE.
[HON. SHANE DEVINE, SENIOR U.S. DISTRICT JUDGE]

Before
Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
and Cyr, Circuit Judge.

Gerald M. Zelin, with whom Diane M. Gorrow and Soule, Leslie, Zelin, Sayward and Loughman were on brief for appellant.

Ellen J. Shemitz, with whom Michael R. Chamberlain and Chamberlain and Connor were on brief for the appellees.

April 28, 1994

CYR, Circuit Judge. Plaintiffs-appellees Kevin W. Murphy (Kevin) and his parents, Janice and Kevin C. Murphy, brought this action under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*,[1] to compel defendant-appellant Timberlane Regional School District (Timberlane) to provide Kevin with compensatory education for the two-year period during which he received no educational services due to the failure of the parties to agree upon an appropriate individual educational plan (IEP). The district court ultimately granted summary judgment against Timberlane, and Timberlane appealed. We affirm the district court judgment.

I

BACKGROUND

After incurring an accident-induced disability at an early age, Kevin was determined a disabled individual entitled to special educational services under the IDEA.[2] Several years later, the

[1] The IDEA formerly was known as the Education of the Handicapped Act. *See* Pub. L. 102-119, § 25(b), Oct. 7, 1991, 105 Stat. 607 (substituting "Individuals with Disabilities Education Act" for "Education for the Handicapped Act").

[2] We related only the background necessary to an understanding of this appeal. For greater detail, see *Murphy* v. *Timberlane Regional Sch. Dist.*, 973 F.2d 13, 14-15 (1st Cir. 1992) (vacating summary judgment against the Murphys) ("*Murphy I*").

As the court explained in *Murphy I*:

> [The IDEA] requires . . . participating states [to] adopt policies assuring all students with disabilities the right to a "free appropriate public education." 20 U.S.C. § 1412(1). New Hampshire has adopted the required policies and attempts to comply with the requirements of the Act.
>
> As defined by [the IDEA], the term "free appropriate public education" refers to the special education and related services that must be provided in conformity with an individualized education program (IEP). 20 U.S.C. § 1401(a)(20). An IEP is a statement of the educational program which must be written for each child and designed to

Murphy family moved to Plaistow, New Hampshire, which is within the Timberlane Regional School District. In September 1981, Timberlane placed Kevin in a special educational program at Charlotte Avenue School, a private elementary school in Nashua, New Hampshire. Although Kevin's parents originally agreed to this placement, they soon expressed concerns to his teacher and to Timberlane's special education administration that Kevin was regressing academically. In December 1981, after Kevin suffered a seizure at home, his parents decided not to return him to school. Kevin received no educational services from Timberlane between January 1982 and January 1984, the two-year period to which the compensatory education claim at issue in this case relates. Finally, in January 1984, after a great many meetings and an abortive truancy proceeding against Kevin's father, the parties came to an agreement on Kevin's placement at Pinkerton High School, where he remained through the 1988-89 school year.[3]

In the fall of 1988, Mr. Murphy and Timberlane officials had discussions concerning continuation of Kevin's special

---

> meet each child's unique needs. 20 U.S.C. § 1401(a)(19). The IEP is developed by a team including a qualified representative of the local educational agency, the teacher, the parents or guardian, and, where appropriate, the student. *Id.* . . . An IEP is appropriate under [the IDEA] if it provides instruction and support services which are reasonably calculated to confer educational benefits to the student. *Board of Education* v. *Rowley*, 458 U.S. 176, 203-07 (1982); *Abrahamson* v. *Hershman*, 701 F.2d 223, 226-27 (1st Cir. 1983).
>
> [The IDEA] further requires states to establish and maintain certain procedures "to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Parents who believe that a proposed IEP is inappropriate are entitled to an impartial due process hearing. 20 U.S.C. § 1415(b)(2). Any party aggrieved by the decision of the administrative hearing officer may appeal to either state or federal court. 20 U.S.C. § 1415(e)(2).

Murphy I, 973 F.2d at 14.

[3] Although briefly placed in two different schools for evaluation, in June 1982 and October-November 1983, Kevin was not returned to a permanent educational setting until January 1984.

education beyond his twenty-first birthday on July 9, 1989. Mr. Murphy later signed Kevin's 1988-89 IEP with the understanding that Kevin would be provided special educational services beyond age twenty-one. On January 5, 1989, however, the Timberlane school board rejected a request by the Timberlane superintendent to fund continued special education for Kevin. On July 24, 1989, shortly after Kevin's twenty-first birthday, George Wright, Timberlane's representative on Kevin's IEP team, notified the Murphys that Kevin would be discharged as a special education student.

Kevin is now twenty-five years of age and no longer entitled to a free public education under New Hampshire law. *See* N.H. Rev. Stat. Ann. § 186-C:9 (disabled "child shall be entitled to continue in an approved program until such time as the child has acquired a high school diploma or has attained the age of 21, whichever comes first"); *see also id.* § 186-C:2 (similar). In August 1989, less than one month after Kevin had been discharged, the Murphys requested an administrative hearing. The Murphys maintained that Kevin was entitled to compensatory educational services beyond age twenty-one as a consequence of Timberlane's failure to provide special education during the two-year period from January 1982 through January 1984. The Murphys specifically alleged that Timberlane had violated the IDEA by failing either to propose an IEP acceptable to all IEP team members or to initiate administrative proceedings to resolve the IEP impasse in accordance with N.H. Code Admin. R. Ed. 1125.01(b)(3)-b ("section 1125").[4]

---

[4] Section 1125 states:

> If the parent[s] inform the district of their disagreement, or if they fail to make a decision within the specified time frame, it shall be interpreted as disagreement with the decision or action proposed by the local school district's Special Education Evaluation/Placement Team. *If the Local Education Agency feels its action or decision should*, in the best interests of the student, *be implemented, the Local Education Agency shall initiate its right of due process* as specified in the Complaint and Impartial Due Process Hearing Procedures Section of the Standards to obtain the authority to implement its decision. (emphasis added).

The administrative hearing officer determined that the Murphys' claim for compensatory educational services was barred by laches. The United States District Court for the District of New Hampshire granted summary judgment in favor of Timberlane, affirming the administrative decision. We vacated the district court decision and remanded for further findings relating to the laches defense. *Murphy I*, 973 F.2d at 18. On remand, after receiving evidence and argument on both the laches defense and the cross-motions for summary judgment, the district court rejected Timberlane's laches defense, denied its motion for summary judgment based on a statute of limitations defense, and granted summary judgment for the Murphys. *Murphy* v. *Timberlane Regional Sch. Dist.*, 819 F.Supp. 1127 (D.N.H. 1993) ("*Murphy II*"). Timberlane appeals the district court order.

II

DISCUSSION

A. *Laches*

When Timberlane's laches defense was before us in 1992, we explained that "[t]he equitable doctrine of laches is an affirmative defense that serves as a bar to a claim for equitable relief 'where a party's delay in bringing suit was (1) unreasonable, and (2) resulted in prejudice to the opposing party.'" *Murphy I*, 973 F.2d at 16 (quoting *K-Mart Corp.* v. *Oriental Plaza, Inc.*, 875 F.2d 907, 911 (1st Cir. 1989)). We went on to hold that "the Murphys" delay in filing their claim was not so unreasonable as to make the laches defense available *without a clear showing of prejudice*." *Id.* (emphasis added). On remand, the district court found that the delay had not prejudiced Timberlane's ability to present its case as a result of the unavail-

ability or failed memories of key witnesses. *Murphy II*, 819 F.Supp. at 1133. Our review reveals no abuse of discretion by the district court. *See K-Mart Corp.*, 875 F.2d at 911.[5]

Timberlane represented to the district court that "most of the primary actors" from the relevant period were unavailable, and that the "memories of critical witnesses had failed." However, two of these "primary" witnesses (Kevin's teachers: Martha Kadel and Claudia Libis) *testified* at the district court hearing. A third key witness, Nikolas Sarbanis, resides within the reach of the district court's subpoena power, yet Timberlane did not produce him. Timberlane rested its "prejudice" showing relating to the other "primary" witness, former Timberlane Superintendent Robert Crompton, solely on its unsupported assertion that he was unavailable. The district court received testimony, however, that Crompton resides in Florida, and Timberlane made no proffer that he was either unable or unwilling to testify. *See Hoover* v. *Department of Navy*, 957 F.2d 861, 864 (Fed. Cir. 1992) (noting that "prejudice" showing must be supported by "substantial evidence" and holding, on similar facts, that this burden "is not met simply by showing that a potential witness has retired" outside the subpoena power of the court.) Moreover, Timberlane did not assert, let alone show, that Crompton's testimony would not be available by deposition. *See, e.g.*, *Fairfield 274-278 Clarendon Trust* v. *Dwek*, 970 F.2d 990, 994-95 (1st Cir. 1992) (explaining requirements for the introduction of deposition testimony when witnesses are unavailable, pursuant to Fed. R. Civ. P. 32(a)(3)).

The district court further found that Timberlane had failed to take reasonable steps to refresh its witnesses:

---

[5] Because the district court conducted a preliminary hearing at which the parties were allowed to present evidence, *see* Fed. R. Civ. P. 12(d), "abuse of discretion" is the appropriate standard of review, *see Rivera-Gomez* v. *de Castro*, 900 F.2d 1, 2-3 (1st Cir. 1990), notwithstanding that the laches defense originally was raised on motion for summary judgment.

> At the [district court] hearing, [six Timberlane witnesses] testified on . . . direct examination as to aspects of their involvement with Kevin's special education program which they could not remember. On . . . cross-examination [by the Murphys' counsel], however, each acknowledge that [Timberlane] had not shown them relevant documents contained in the record of the instant case, such as transcripts of significant meetings concerning Kevin.

Murphy II, 819 F.Supp. at 1133.

After reviewing the entire hearing transcript with care, we are persuaded that the rejection of Timberlane's claim of prejudice was well within the district court's sound discretion. *See K-Mart Corp.*, 875 F.2d at 912; *see also Kersey* v. *Dennison Mfg. Co.*, 3 F.3d 482, 486 (1st Cir. 1993) (abuse of discretion occurs " 'when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error judgment in calibrating the decisional scales.' ") (quoting *United States* v. *Roberts*, 978 F.2d 17, 21 (1st Cir. 1992)) (citations omitted).

B. *The Timberlane Motion for Summary Judgment*

Following the evidentiary hearing on its laches defense, Timberlane moved for summary judgment on the ground that the present action is time-barred. Reasoning from the absence of an express limitation provision in both the IDEA and the implementing New Hampshire statute, *see* N.H. Stat. Ann. § 186-C,[6] the district court ruled that laches alone could provide

[6] New Hampshire has since adopted a limitations scheme specifically applicable to special education claims. *See* N.H. Rev. Stat. Ann. § 186-C:16-b (effective June 30, 1992).

a temporal limitation on the Murphys' compensatory education claim. *Murphy II*, 819 F.Supp. at 1132. We conclude that the compensatory education claim was not time-barred under the New Hampshire limitation provision appropriate for "borrowing" in the present case. *See Garside* v. *Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990) ("court of appeals [may] affirm a judgment on any independently sufficient ground").

(i) *The "Borrowing" Methodology*

The Supreme Court has described the federal "borrowing" praxis in broad terms: "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson* v. *Garcia*, 471 U.S. 261, 266-67 (1985) (§ 1983 action). *See also Campbell* v. *Haverhill*, 155 U.S. 610, 616 (1895) (absent federal limitation, congressional intent is best served if the federal right is "enforced in the manner common to like actions" under state law); *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 198 (1st Cir. 1987) (borrowing N.H. RSA § 508:4 six-year limitation on "personal actions" for application to § 1981 action). In selecting the appropriate state limitation, *Campbell* and its progeny require the borrowing court to balance both the interests of the parties and the legislative goals of the particular federal statute. *See Amann* v. *Town of Stow*, 991 F.2d 929, 931-33 (1st Cir. 1993) (borrowing administrative review limitation period after balancing three IDEA policy goals: the parental interest in participation, the school's interest in speedy resolution of disputes, and the child's interest in receiving educational entitlement). Similarly, the Sixth Circuit has observed that:

> [T]he nature of actions that can be brought under the [IDEA] as well as the Act's goal of proper education of the handicapped child make the selection of state limitations periods on a case-by-case basis an imperative. The individual case must be characterized by considering the facts, the circumstances, the posture of the case and the legal theories presented.

Janzen v. *Knox County Bd. of Educ.*, 790 F.2d 484, 487 (6th Cir. 1986) (citation omitted); *see Bow Sch. Dist.* v. *Quentin W.*, 750 F.Supp. 546, 549 (D.N.H. 1990) (similar) (Stahl, J.); *see also Tokarcik* v. *Forest Hills Sch. Dist.*, 665 F.2d 443, 449 (3d Cir. 1981) ("Ultimately, we must be guided by the aim of the [IDEA] in devising the limitation period in issue here. If state limitations law conflicts with federal procedural safeguards embodied in [the IDEA], the federal concerns are paramount."), *cert. denied*, 458 U.S. 1121 (1982).

(ii) *The Compensatory Education Claim*

First, we must attempt to "characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle." *Wilson*, 471 U.S. at 268. The present IDEA claim seeks to vindicate Kevin's "right to a free appropriate public education," 20 U.S.C. § 1412(1); *see also* 20 U.S.C. § 1412(2)(b), based on the contention that Kevin was deprived of educational services for two years while Timberlane, contrary to its mandated duty under section 1125, failed to resort to the New Hampshire administrative process to resolve the impasse between Timberlane and the Murphys as to what constituted an "appropriate education." *See generally Honig* v. *Doe*, 484 U.S. 305, 310 (1988) (finding IDEA "confers upon disabled children an enforceable substantive right to public education"). The Murphys

request equitable relief in the form of an injunction compelling Timberlane to provide Kevin with two years of compensatory special education.

The peculiar procedural warp presented in this case seems to us sufficiently important to qualify as a defining feature of the limitation to be borrowed from New Hampshire law. The administrative hearing officer initially ruled that the Murphys' hearing application was timely under the New Hampshire statute of limitations governing "personal actions" in general. *See* N.H. Rev. Stat. Ann. § 508:4, and therefore that the compensatory education claim should be addressed on the merits. Later, on reconsideration, the hearing officer ruled that the compensatory education claim was barred by laches. The Murphys filed a timely appeal to the district court from the administrative ruling on laches pursuant to 20 U.S.C. § 1415(e)(2), and the district court upheld the administrative ruling. On appeal, we vacated the district court decision and remanded to the district court for further proceedings. *Murphy I*, 973 F.2d at 18.

The district court convened an evidentiary hearing on laches, and presumably in light of the circumstances of the case — Kevin was approaching his mid-twenties by this point, the litigation had been pending for more than three years, and an extensive district court evidentiary record had already been generated — *the district court decided to adjudicate the Murphys' compensatory education claim on the merits* rather than remand to the administrative hearing officer. *See* 20 U.S.C. § 1415(e)(2) (courts sitting in review of administrative rulings may supplement the hearing record with additional evidence); *Pihl* v. *Massachusetts Dept. of Educ.*, 9 F.3d 184, 191 (1st Cir. 1993) (remand to administrative hearing officer may not be required where the record contains sufficient factual development and the "peculiar expertise" of a hearing officer is not required). Neither party opposed the district court's decision to address the merits. Thus, the instant appeal challenges the

district court order allowing the compensatory education claim on the merits.

This tortuous procedural trail is material to the present inquiry in at least two significant respects. First, in contradistinction to the "typical" IDEA action, this case does not concern the appropriate limitation to be applied to an appeal from a state administrative ruling to a federal district court under 20 U.S.C. § 1415(e)(2), but to the initiation of a request for an "impartial due process" administrative hearing under 20 U.S.C. § 1415(b)(2) *in the first instance*. *Compare, e.g., Amann*, 991 F.2d at 933-34 (importing 30-day limitation from Massachusetts Administrative Procedure Act in § 1415(e)(2) case); *Bow*, 750 F.Supp. at 550-51 (similar, applying 10-day New Hampshire administrative review limitation).[7] Second, we believe that several factors which militate in favor of borrowing an abbreviated limitation period for application in the context of an appeal from an administrative ruling under section 1415(e)(2) are inapposite in the present context. For instance, where a party seeks administrative review in order to resolve an *ongoing* IEP impasse, the need for a *speedy* resolution securing the eligible child's IDEA entitlement at the earliest possible time must be considered a dominant IDEA policy objective. *Amann*, 991 F.2d at 932. The present action, on the other hand, concerns a claim for compensatory education based exclusively on a course of conduct already *concluded*, and thus does not implicate an equivalent need for urgent administrative intervention. Furthermore, whereas the limitation borrowed in this case will govern whether the Murphys' compensatory education claim can ever be considered *by any tribunal in the first instance*, i.e. a section 1415(e)(2) proceeding

[7] The thirty-day limitation borrowed in *Bow* appears to have been supplanted by a newly enacted limitation scheme, applicable exclusively in the special education context. The new provision prescribes a 120-day limitation on any "appeal from a final administrative decision in a special education due process hearing to a court of competent jurisdiction." N.H. Rev. Stat. Ann. § 186-C:16-b IV.

the district court normally functions something like an appellate court reviewing a state agency decision on the merits. *Bow*, 750 F.Supp. at 549. Consequently, the statute of limitations defense interposed by Timberlane would not merely preclude a judicial "second look" at an adverse administrative ruling, but foreclose *any ruling, administrative or judicial*, on Timberlane's legal responsibility for the otherwise irretrievable two-year IDEA educational entitlement denied Kevin.

Thus, the broad equitable considerations and finality concerns generated by the present action — where absent a compensatory education award there can be no "next year" for the disabled individual no longer eligible for free public education — are not ordinarily involved in an appeal to the district court under section 1415(e)(2). *Compare Amann*, 991 F.2d at 933 (holding short limitation period appropriate, in part because parents can always contest *next year's* proceedings if need be). We think these considerations bear out the view endorsed by the *Bow* court that "[n]othing prevents different provisions of a federal statute from being characterized differently for statute of limitation purposes." *Bow*, 750 F.Supp. at 549, *citing Wilson*, 471 U.S. at 268. Under the required "borrowing" methodology, therefore, we weigh the federal interests manifest in the IDEA, the state and school district interests implicit in section 1125, and the interests of the learning disabled pupil and his family, all in light of the particular procedural posture and equitable considerations disclosed in the present record.

(iii) *The Appropriate New Hampshire Limitation*

Timberlane advocates borrowing the four-year limitation applicable to "Actions to Recover For Bodily Injury" against local governmental units, includintg school districts. *See* N.H. Rev. Stat. Ann. § 507-B:7 ("RSA 507-B:7") (amended to three-year period, effective in actions arising after May 17, 1989).

An alternate candidate is the New Hampshire statute of limitations which formerly prescribed a six-year limitation on "personal actions" accruing prior to July 1, 1986. N.H. Rev. Stat. Ann. § 508:4 ("RSA 508:4") (amended to three-year period, effective in actions arising after July 1, 1986). As the present cause of action accrued before RSA 508:4 and RSA 507-B:7 were amended, *see infra* p. 21, the pre-amendment versions govern. *See Gonsalves* v. *Flynn*, 981 F.2d 45, 47-48 (1st Cir. 1992) (noting that federal "borrowing" court will respect state law provision prescribing exclusively prospective application of amendatory limitation), *citing Kadar Corp.* v. *Milbury*, 549 F.2d 230, 234 n.3 (1st Cir. 1977).

We think it clear that RSA 507-B:7 does not meet the threshold "like action" test, *see Campbell*, 155 U.S. at 616, because it applies only in actions "to recover for bodily injury, personal injury, or property damage caused by" fault attributable to a governmental unit. N.H. Rev. Stat. Ann. § 507-B:2. The New Hampshire Supreme Court has observed: "Taken as a whole, the law [RSA 507:B] seems designed to limit municipal liability arising from tort suits and related personal property claims. . . ." *Cannata* v. *Deerfield*, 566 A.2d 162, 167 (N.H. 1989). The Murphys' compensatory claims education claim, on the other hand, is premised on allegations that Timberlane denied Kevin's federal statutory rights by withholding all special education services for a two-year period in violation of the IDEA and section 1125, the New Hampshire implementing regulation.[8]

Moreover, certain extraordinary characteristics of the present compensatory education claim point up the appropriateness of the New Hampshire catch-all limitation applicable to

[8] Even if the present claim were somehow considered tort-based, the required "borrowing" methodology does not encourage recourse to state limitations tailored to curtail public liability. *See, e.g., Wilson*, 471 U.S. at 279 (noting, in context of § 1983 action, that "the very ineffectiveness of state remedies" may have motivated Congress to impose a federal enforcement scheme against state actors); *cf. Rowlett*, 832 F.2d at 198 (borrowing N.H. RSA 508:4 for § 1981 claim).

"personal actions" generally. Prior to its amendment in 1986, RSA 508:4 stated: "*Except as otherwise provided by law*, all personal actions, except actions for slander or libel, may be brought only within 6 years of the time the cause of action accrued." Although we have found no precise definition of the term "personal actions," the New Hampshire Supreme Court often has described RSA 508:4 as a "general statute of limitations," *see, e.g.*, *Petition of Keene Sentinel*, 612 A.2d 911, 914 (N.H. 1992); *Clark* v. *Exeter Cooperative Bank*, 344 A.2d 5, 5 (N.H. 1975). Further, the opening proviso — "[e]xcept as otherwise provided by law" — strongly suggests that RSA 508:4 is meant to serve as a "backstop" limitation on civil actions not governed by some more particular limitation. *Compare, e.g.*, N.H. Rev. Stat. Ann. § 507-C:4 (providing two-year limitation on actions for "medical injury"); N.H. Rev. Stat. Ann. § 508:4-B (providing eight-year limitation on actions for "damages from construction").

As an IDEA-based claim for compensatory education is similar to a civil rights action, the "borrowing" praxis also may be informed by relevant principles developed in the context of civil actions under 42 U.S.C. §§ 1981 and 1983. The Supreme Cour has identified a general preference for borrowing state limitations governing personal injury actions, *Wilson*, 471 U.S. at 279 (§ 1983 action), in part because "[i]t is most unlikely that the period of limitations applicable to [personal injury actions] ever was, or ever would be, fixed in a way that would discriminate against federal claims, *or be inconsistent with federal law in any respect*." *Id.* (emphasis added). Under this criterion, as between RSA 507-B:7 and RSA-508:4 — the statute of limitations governing personal actions generally — RSA-508:4 presents the more analogous New Hampshire statute under the "like action" test established in *Campbell*, 155 U.S. at 616, hence the more appropriate for application to the

IDEA claim for compensatory education in the present case.[9] *Cf. Lillios* v. *Justices of New Hampshire Dist. Court*, 735 F.Supp. 43, 48 & n.9 (D.N.H. 1990) (RSA 508:4 provides limitation applicable to § 1983 actions brought in New Hampshire.[10]

We next consider whether borrowing RSA 508:4 comports with the purposes underlying the IDEA and the New Hampshire implementing regulation. *See Wilson*, 471 U.S. 266-67; *Bow*, 750 F.Supp. at 551. The central purpose of the IDEA is to secure special educational entitlements to eligible recipients. *See* 20 U.S.C. § 1400(b)(9) ("it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law"). Likewise, in the present context the borrowing praxis must take into account the central importance of the IDEA's procedural overlay. As the Supreme Court has observed, procedure is at the very core of the IDEA:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Board of Educ. v. *Rowley*, 458 U.S. 176, 205-06 (1982); *accord W.G.* v. *Board of Trustees*, 960 F.2d 1479, 1484 (9th

---

[9] *See James* v. *Nashua Sch. Dist.*, 720 F.Supp. 1053, 1058 (D.N.H. 1989). The *James* court borrowed RSA 508:4 for application to a claim for attorney fees in an IDEA action. As the Murphys seek to enforce a substantive federal right rather than a derivative fee-shifting provision, however, the RSA 508:4 limitation is even more suitable for borrowing in the instant action on general policy grounds.

[10] We need not address any impact that amended RSA 508:4 (three-year period), or newly enacted RSA § 186-C:16-b, may have either on the present analysis or on earlier case law relating to "borrowing" in civil rights actions under 42 U.S.C. §§ 1981 and 1983.

Cir. 1992) (noting centrality of implementing procedure to IDEA statutory scheme); *Mrs. D.* v. *Wheaton*, 916 F.2d 69, 72-73 (2d Cir. 1990) (same).

The core role of procedure in the IDEA setting is well illustrated by Timberlane's failure to initiate the required administrative proceedings, *see* N.H. Code Admin. R. Ed. 1125.01(b)(3)-b; *supra* note 4, to end the IEP impasses in this case. While parents and school officials dithered and debated, a disabled child with special educational needs lost day after irreplaceable day of educational opportunity mandated by law. We cannot overlook the reality that a central federal policy underlying the IDEA, and an important feature of the IDEA-implementing scheme adopted in New Hampshire, have both been blunted. Thus, absent a more particular limitation applicable to this extraordinary compensatory education claim, we think it appropriate to borrow the New Hampshire catchall limitation applicable to personal actions generally.[11]

In addition, the more abbreviated the limitation on compensatory education claims the greater the disincentive to parents to shed an adversarial posture and get on with the business of cooperating with school officials to further the special-education needs of the child. *See David D.* v. *Dartmouth Sch. Comm.*, 775 F.2d 411, 424 (1st Cir. 1985) (IDEA embodies preference for educational decisions arrived at through "good-faith cooperation and negotiation among the parties"); *see also Murphy I*, 973 F.2d at 16 ("Obviously, the Murphys were not sitting on their rights, but were attempting to resolve their dif-

[11] The availability of compensatory education as a remedy under the IDEA — the one form of IDEA relief that holds any potential for redressing this deprivation — has only recently been recognized in this Circuit, *see Pihl*, 9 F.3d at 187-89; and only a year earlier in the District of New Hampshire, *Manchester Sch. Dist.* v. *Christopher B.*, 807 F.Supp. 860, 876-88 (D.N.H. 1982). The first reported court of appeals case to recognize a compensatory education claim is *Miener* v. *Missouri*, 800 F.2d 749, 753 (8th Cir. 1986). Thus, the recency and novelty of the compensatory education remedy likewise suggest that the catch-all limitation prescribed in RSA 508:4 is most suitable for borrowing.

ferences with the school district without resorting to litigation."). The resultant undermining of section 1125 would be particularly erosive of IDEA policy in New Hampshire. Once the IEP negotiations had remained at an impasse for a reasonable period of time, *i.e.*, not long into the two-year period during which he received no special education, the onus was on Timberlane to obtain administrative approval to implement the IEP it considered appropriate for Kevin. *See supra* note 4.

Finally, as noted above, most IDEA cases involve the borrowing of state statutes of limitations for application to judicial appeals from administrative decisions. *See Amann*, 991 F.2d at 931 (collecting administrative review cases borrowing limitations ranging from thirty days to three years); *Bow*, 750 F.Supp. at 548 (similar). Careful research discloses but one case, *Hall* v. *Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 982 (1992), involving a compensatory education claim even roughly analogous to the Murphy claim. The blind twenty-seven-year-old plaintiff in *Hall* brought an IDEA action challenging the *appropriateness* of the special educational services provided to her by the defendant school district between five and ten years earlier. *Id.* at 404-06. The *Hall* court assumed, *arguendo*, that a five-year limitation applied, but found the action time-barred in any event because it could not have accrued less than six years before the complaint was filed. *Id.* at 408-09. Although *Hall* is distinguishable from the present action on a number of grounds, the most cogent distinction is that the present dispute involves a *total* denial of all special education services for an extended period of time, not merely a challenge to the *appropriateness* of special education services provided years earlier. Revisiting the *appropriateness* of special education services actually provided in school years long since passed may indeed be an exercise of "extremely limited utility," as has been suggested, *see Bow*, 750 F.Supp. at 550, but given the totality

of the present deprivation the effort to evaluate the merits of the compensatory education claim in this case is both useful and far less problematic.

(iv) *Accrual*

We turn now to the question of accrual, which is governed by federal law. *Hall*, 941 F.2d at 408; *G.D.* v. *Westmoreland Sch. Dist.*, 783 F.Supp. 1532, 1535 (D.N.H. 1992) (same); *cf.*, *Rivera-Muriente* v. *Agosto-Alicea*, 959 F.2d 349, 353 (1st Cir. 1992) (same, § 1983 case). "The general rule under federal law is said to be that [IDEA] claims 'accrue when the parents know or have reason to know of the injury or event that is the basis for their claim.' " *Hall*, 941 F.2d at 408 (quoting Judith W. Wegner, *Educational Rights of Handicapped Children*, 17 J. of L. & Educ. 625, 654 (1988)). As with the methodology for borrowing a limitation from state law, no mechanical formula controls the accrual determination: "Where a statute does not indicate when a cause of action accrues, the court must 'keep[] in mind the purpose of the [Act] and the practical ends to be served by a period of limitations.' " *G.D.*, 783 F.Supp., at 1535 (alterations in original, quoting *Albert* v. *Maine Cent. R.R.*, 905 F.2d 541, 543 (1st Cir. 1990)).

Pinpointing accrual in the present case would pose a complex question, inasmuch as the Murphys' action challenges an entire course of conduct by Timberlane. *Compare, e.g.*, *Amann*, 991 F.2d at 933-34 (involving an appeal from an administrative decision and noting under Massachusetts law that limitation runs from "receipt of notice of final decision"); *G.D.*, 783 F.Supp. at 1535-36 (similar, N.H. law). We need not fix the precise date of accrual, however, since the Murphys' claim unquestionably accrued within the six-year period preceding their request for administrative review on August 20, 1989. Thus, the request for administrative review was timely whether

accrual occurred in October of 1983 upon Kevin's initial trial placement at the Pinkerton school (as Timberlane urged below), or at the time he was permanently placed in January of 1984 (as the Murphys claimed), or at some intermediate time. Moreover, from whatever point in time within the two-year period the Murphys might be found to have known (or had reason to know) either of "the injury or the event that is the basis for their [compensatory education] claim," *Hall*, 941 F.2d at 408, Timberlane remained in continuous violation of its section 1125 obligation to pursue an administrative resolution to the IEP stalemate. Consequently, we conclude that Timberlane's ongoing failure to comply with section 1125 throughout the relevant portion of the two-year period constituted a unitary violation under the IDEA and the New Hampshire implementing regulation.

C. *The Murphy Motion for Summary Judgment*

As a threshold matter, two arguments advanced by Timberlane on the merits have been foreclosed by our recent decision in *Pihl* v. *Massachusetts Dep't of Educ.*, 9 F.3d 184 (1st Cir. 1993), recognizing a compensatory education claim under the IDEA, *id.* at 187-89, notwithstanding that the student was beyond the eligible age for a free education under state law, *id.* at 189-90. Thus, two further issues remain unaddressed.

1. *Section 1125*

The district court held Timberland liable for failing to fulfill its section 1125 responsibility either to present an acceptable IEP or seek administrative enforcement. The district court simply applied our own straightforward construction of section 1125:

> In New Hampshire, if the parents disagree with a proposed IEP and the local educational agency feels it would be in the best interest of the child to implement the IEP, the local agency is *required* to initiate administrative procedures to obtain permission from a hearing officer to implement the IEP. N.H. Code Admin. R. Ed. 1125.01(b)(3)-b. *No such procedures were ever initiated by Timberland.*

Murphy I, 973 F.2d at 17 (footnote omitted & emphasis added). Under section 1125, the school district must take the initiative to ensure that intransigence and foot-dragging in the IEP process, whether bureaucratic or parental, do not indefinitely compromise the child's right to a free and appropriate public education. *See, e.g., W.G.*, 960 F.2d at 1486 (parental conduct does not waive responsibility of school district); *Town of Burlington* v. *Department of Educ.*, 736 F.2d 773, 795 (1st Cir. 1984) (same), *aff'd*, 471 U.S. 359 (1985).

Timberlane's primary argument on appeal is that an IDEA claim, a *federal* cause of action, cannot be premised on a violation of a *state* administrative regulation.[12] Its argument overlooks the IDEA framework and our case law. The IDEA invests expansive discretion in the states to structure implementing procedures and enforcement mechanisms, thereby constructively incorporating duly promulgated state regulations:

---

[12] Timberland also argues that section 1125 is invalid because it imposes on the school district obligations beyond those authorized either by the IDEA or the New Hampshire implementing statute. Neither argument is persuasive. First, the IDEA and its companion regulations merely establish foundational requirements — states may impose more stringent procedural and substantive requirements. *See Burlington*, 736 F.2d at 789. Second, section 1125 is well within the broad authority conferred upon the New Hampshire Board of Education to promulgate regulations under the IDEA. *See* N.H. Rev. Stat. Ann. § 186-C:16 (authorizing, *inter alia*, regulations governing appeals of IEP team decisions and regulations relating to "other matters" pertinent to implementation of the IDEA).

> [S]tate standards, be they substantive or procedural, that exceed the federal basic floor of meaningful, beneficial educational opportunity . . . will operate to determine what an appropriate education requires for a particular child in a given state.

Id. at 789 (footnote omitted); *accord David D.*, 775 F.2d at 417 (1st Cir. 1985) (it is "beyond cavil that the federal [IDEA] standard explicitly incorporates" certain state standards); *Doe* v. *Board of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 457 (6th Cir. 1993) (same, citing cases). It is plainly true, of course, as Timberlane argues, that not every procedural irregularity gives rise to liability under the IDEA. Nevertheless, "procedural inadequacies [that have] compromised the pupil's right to an appropriate education . . . or caused a deprivation of educational benefits" are the stuff of successful IDEA actions. *Roland M.* v. *Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (citations omitted), *cert. denied*, 499 U.S. 912 (1991). And that is exactly what happened here.

We emphasized in *Murphy I* that whereas "parents are entitled to request a hearing if they disagree with an IEP, state regulations impose upon Timberlane not only the right, but the *obligation* to do the same." 973 F.2d at 17 (emphasis in original).[13] Thus, by its longstanding procedural lapse in failing to initiate administrative review as required under section 1125, Timberlane abdicated its responsibility to terminate the IEP impasse preventing Kevin's access to a free and appropriate education. We think a procedural default which permits a dis-

---

[13] Timberlane's misconceptions about the IDEA are betrayed, as much as anything, by the contention that its institution of truancy proceedings should be considered the rough equivalent of the administrative adjudication required under section 1125. Even assuming that Timberlane had done something more than merely file the truancy petition, a coercive adversarial proceeding against a parent is no substitute for a substantive review of the special educational needs of the handicapped child.

abled child's entitlement to a free and appropriate education to go unmet for two years constitutes sufficient ground for liability under the IDEA. *See, e.g., W.G.*, 960 F.2d at 1484 (when severe procedural flaws infect IEP process an action lies under IDEA); *Roland M.*, 910 F.2d at 994 (same); *Mrs. C.*, 916 F.2d at 72-73 (same); *cf. Hampton Sch. Dist.* v. *Dobrowolski*, 976 F.2d 48, 53-54 (1st Cir. 1992) (technical IDEA violations may be insufficient to warrant setting aside IEP).

2. *Summary Judgment*

Lastly, Timberlane claims that genuine issues of material fact precluded summary judgment as to whether: (1) Kevin's parents were intransigent and at least partly responsible for interrupting Kevin's education, and (2) the educational services Timberlane provided from 1985 to 1989 were "more than appropriate," and thus compensated for the educational loss occasioned during 1982-84. The party resisting summary judgment "may not rest upon the mere allegations or denials of the . . . pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). There is no trialworthy issue unless there is sufficient competent evidence to enable a finding favorable to the opposing party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A painstaking review of the entire record has not disclosed, nor does Timberlane identify, any evidence sufficient to generate a genuine factual issue as to either contention, even assuming their materiality.[14] Instead, consistent with its prior

[14] The first hurdle confronting Timberlane, of course, is that parental intransigence would not absolve the school district of its responsibility under section 1125. Indeed, section 1125 targets intransigence. *See Murphy I*, 973 F.2d at 17; *supra* p. 23. Thus, Timberlane can demonstrate no issue of *material* fact in this regard. But neither has it demonstrated a *genuine* issue of fact. Although the record contains

strategy, Timberlane elected to try to fend off summary judgment through recourse to Fed. R. Civ. P. 56(f), which permits a party to establish, *by affidavit*, that evidence which *would* demonstrate aw trialworthy issue is for some valid reason unavailable. *See* Fed. R. Civ. P. 56; *see also* James W. Moore et al., *Moore's Federal Practice* ¶¶ 56.22-56.24 (1993). Timberlane relied entirely on its contention, unsubstantiated by the required affidavit,[15] that it needed "an opportunity to conduct discovery to reconstruct [the] chronology [of Kevin's education] and to fill in critical gaps about events which occurred before, during and after the years in question[,]" and to "depose the out-of-state witnesses."

The district court rejected Timberlane's Rule 56(f) initiative, on the ground that the evidence adduced at the hearing on the laches defense demonstrated that Timberlane had made no serious effort to present its putative evidence. The court accordingly ruled that Timberlane could not take refuge from summary judgment under Rule 56(f) since the memories of its witnesses were available for affidavit purposes in opposition to the Murphys' motion for summary judgment. The Rule 56(f) determination is reviewed for abuse of discretion. *First*

---

several "sarcastic" letters from Mr. Murphy to Mr. Sarbanis, Timberlane presented no evidence suggesting anything more than that Mr. Murphy was a tenacious and zealous advocate for his son's interests. Summary judgment should not be disturbed on so fragile a claim, especially as two school district representatives praised Mr. Murphy as a cooperative and concerned, indeed model, parent. Even though Mr. Sarbanis, the one school district official with whom Mr. Murphy clearly had a stormy relationship, still lives in New Hampshire, Timberlane presented no affidavit from Sarbanis. And although Timberlane's pleadings are replete with allegations that Mr. Murphy was intransigent, "[b]rash conjecture, coupled with the hope that something concrete will materialize, is insufficient to block summary judgment." *Dow* v. *United Bhd. of Carpenters*, 1 F.3d 56, 58 (1st Cir. 1993).

[15] Given that the district court had already rejected essentially these same contentions, advanced in support of Timberlane's laches defense, *see supra* pp. 6-8, the failure to comply with the Rule 56(f) affidavit requirement was no mere technical lapse. *See Hebert* v. *Wicklund*, 744 F.2d 218, 222 (1st Cir. 1984) (Rule 56(f) affidavit requirement generally to be enforced liberally, but district court need not spare litigants the effect of their own neglect).

Nat'l Bank v. *Cities Services Co.*, 391 U.S. 253, 254 (1968). We find none.

In March of 1993, more than one month after the evidentiary hearing on the laches defense, the district court entered a scheduling order requiring the parties to submit "law and/or evidence" on the merits of the compensatory education claim — thereby plaining signaling its intention to proceed beyond the procedural defense interposed by Timberlane. Shortly thereafter the Murphys filed their motion for summary judgment. Thus, although it had clear notice that the district court would proceed to the merits, Timberlane made the strategic decision to persist with its litigation position, *viz.*, that it could not provide evidence because its witnesses (or their memories) were unavailable. The district court did not abuse its discretion by declining to credit or revisit the flawed premise underlying Timberlane's Rule 56(f) motion.

III

DISCUSSION.

For the foregoing reasons, we uphold the district court order disallowing defendant-appellant's defenses and affirm the judgment in favor or plaintiffs-appellees.

Affirmed.

APPENDIX I.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1828

KEVIN W. MURPHY, ETC., ET AL.,
PLAINTIFFS-APPELLEES,

v.

TIMBERLANE REGIONAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

JUDGMENT
Entered April 28, 1994

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered adjudged and decreed as follows: The order and judgment of the district court are affirmed.

By the Court:

Clerk

APPENDIX J.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1828

KEVIN S. MURPHY, ETC.,
PLAINTIFFS-APPELLEES,

v.

TIMBERLANE REGIONAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

ORDER OF THE COURT

Coffin, Senior Circuit Judge,
Torruella, Selya, Cyr, Boudin, and Stahl, Circuit Judges.

Entered: June 16, 1994

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

Francis P. Scigliano, Clerk

Messrs. Chamberlain & Zelin

* Chief Judge Breyer did not participate.

APPENDIX K.

20 U.S.C. § 1412

Sec. 1412. Eligibility requirements

In order to qualify for assistance under this chapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that —

(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

* * *

Sec. 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to —

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit —

(i) proposes to initiate or change, or

(ii) refused to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any part aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded —

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decision (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1414(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this action shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardians otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school,

shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

* * *

34 C.F.R. Part 300

§ 300.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 300.510-300.513.

(20 U.S.C. 1415(b)(1)(C), (D))

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

* * *

§ 300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 300.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the eduation of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

* * *

§ 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

* * *

§ 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and

(b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

* * *

N.H. REVISED STATUTES ANNOTATED
CHAPTER 186-C
SPECIAL EDUCATION

186-C:2 Definitions.

In this chapter:

I. "Educationally handicapped child" means any person 3 years of age or older but less than 21 years of age who has been identified and evaluated by a school district according to the provisions of RSA 186-C:7 and determined to be mentally retarded, hearing impaired, speech or language impaired or both, visually impaired, seriously emotionally disturbed, orthopedically impaired, otherwise severely health impaired, deaf-blind, multihandicapped, or as having specific learning disabilities, who because of such impairment, needs special education or special education and educationally related services.

* * *

186-C:9 Education Required. Each child determined by the local school district as being educationally handicapped in accordance with RSA 186-C:2 and in need of special education or special education and educationally related services shall be entitled to attend an approved program which can implement the child's individualized education plan. Such child shall be entitled to continue in an approved program until such time as the child has acquired a high school diploma or has attained the age of 21, whichever occurs first, or until the school district responsible for developing the child's individualized education plan determines that the child no longer requires special education in accordance with the provisions of this chapter.

186-C:16 Rulemaking. The state board of education shall adopt rules, pursuant to RSA 541-A, relative to:

I. Developing individualized education plans;

II. Approving special education programs;

III. Reporting the number of educationally handicapped children in a school district;

IV. Appealing school district decisions regarding individualized education plans;

V. Determining eligibility for participation in approved programs;

VI. Appointing surrogate parents;

VII. Determining the length of the school year for handicapped children; and

VIII. Other matters related to complying with provisions of this chapter.

* * *

186-C:17 Limitation of Provisions. Nothing in this chapter shall be construed as authorizing any public official, agent, or representative, in carrying out any of the provisions of this chapter to take charge of any child over the objection of either of the parents of such child, or of the person standing in loco parentis to such child except pursuant to a proper court order.

CHAPTER 507-B

BODILY INJURY ACTIONS AGAINST GOVERNMENTAL UNITS

507-B:1 Definitions.

In this chapter:

I. "Governmental unit" means any political subdivision within the state including any county, city, town, precinct,

school district, supervisory union or departments or agencies thereof, or any other body corporate and politic within the state, but does not include the state or any department or agency thereof.

II. "Action to recover for bodily injury" means an action arising out of bodily injury, including an action brought under RSA 556:9-14, whether brought by or on behalf of the person actually sustaining bodily injury or brought by any other person to whom rights may accrue arising out of such injury, regardless of the nature of the damages claimed.

III. "Personal injury" means:

(a) Any injury to the feelings or reputation of a natural person, including but not limited to, false arrest, detention or imprisonment, malicious prosecution, libel, slander, or the publication or utterance of other defamatory or disparaging material, invasion of an individual's right of privacy, invasion of the right of private occupancy, wrongful entry or eviction, mental injury, mental anguish, shock, and, except when against the public policy or the laws of New Hampshire, or both, discrimination; and

(b) Any injury to intangible property sustained by any organization as a result of false eviction, malicious prosecution, libel, slander, or defamation.

The term "personal injury" shall not include "bodily injury" or "property damage."

IV. "Property damage" means a loss through injury to, or destruction of, tangible property.

* * *

507-B:2 Liability for Negligence. A governmental unit may be held liable for damages in an action to recover for bodily injury, personal injury or property damage caused by its fault or by fault attributable to it, arising out of ownership, occupation, maintenance or operation of the following:

I. All premises, except public sidewalks, streets, highways or publicly owned airport runways and taxiways.

II. All motor vehicles.

* * *

507-B:4 Limit of Liability.

I. Liability of a governmental unit for bodily injury, personal injury or property damage sustained by any one person in actions brought under this chapter is limited to $100,000. Such limit applies in the aggregate to any and all actions to recover for bodily injury, personal injury or property damage arising out of bodily injury, personal injury or property damage sustained by one person in a single incident or occurrence.

II. The jury shall not be informed of such limit, but the court shall abate any verdict to the extent it exceeds the limit prescribed in this section. In actions consolidated under RSA 507-B:3, in the event the verdicts exceed the limit prescribed in this section, the verdicts shall be abated pro rata. Interest and costs may be recovered as in any civil action, in addition to the limit prescribed in this section.

* * *

507-B:5 Effect on Common Law. No governmental unit shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other statute.

* * *

507-B:7 Limitation on Actions. No actions shall be maintained against the governmental unit under this chapter unless the same is commenced within 4 years after the time of injury or

damage; provided, however, that, as a condition precedent thereto, the clerk of the governmental unit shall be notified by registered mail within 60 days after said injury or damage as to the date, time and location where said injury or damage occurred and provided that in any case where lack of written notice, actual knowledge or reasonable opportunity to obtain knowledge of any injury or damage within said 60-day period is alleged by the governmental unit, the burden of proof shall be on the governmental unit to show that it was substantially prejudiced thereby.

CHAPTER 508

LIMITATION OF ACTIONS

508:1 Limitation of Chapter. The provisions of this chapter shall not apply to cases in which a different time is limited by statute.

* * *

508:4 Personal Actions.

I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 6 years of the time the cause of action accrued.

II. Personal actions for slander or libel, unless otherwise provided by law, may be brought only within 3 years of the time the cause of action accrued.

* * *

N.H. CODE OF ADMINISTRATIVE RULES

CHAPTER ED 1125

PROCEDURAL SAFEGUARDS

ED 1125.01 PROCEDURAL SAFEGUARDS

All of the following rights and guarantees shall be equally available to parents, legal guardians, surrogate parents, adult students, and Local Education Agencies.

(a) *Right to Appeal*

The parent(s) has the right to appeal any decision of the local school district regarding the identification, evaluation, Individual Education Program, provision of a free, appropriate public education, or placement of the educationally handicapped student according to the procedures outlined in the *Complaint and Impartial Due Process Hearing Procedures* Section of these *Standards*.

(b) *Local Education Agency Responsibilities*

Each Local Education Agency shall develop written procedures to insure the effective implementation of the Procedural Safeguards described in this Section. These written procedures shall be included in the annual Local Special Education Plan.

(1) *Written Prior Notice*

Parents of an educationally handicapped student shall be notified in writing whenever the Local Education Agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, placement of the educationally handicapped student, or the provision of a free, appropriate public education to the educationally handicapped student.

a. The notice shall be written in language understandable to the general public and shall be provided in the native language of the parent(s) or other mode of communication used by the parent(s) unless clearly not feasible to do so.

b. If the native language or other mode of communication of the parent(s) is not written, the Local Education Agency must take steps to insure:

1 That the notice is translated orally into the native language or other mode of communication;

2 That the parent(s) understands the content of the notice.

c. The written notice must include:

1 A description of the action proposed or refused by the Local Education Agency, an explanation of why the Local Education Agency proposes or refuses to take this action, and a description of any option the Local Education Agency considered and the reasons why those options were rejected.

2 A description of the evaluation procedures, tests, records, and reports upon which the action was based.

3 A statement fully informing parents of all rights and procedures available under the following Sections of these *Standards*:

Procedural Safeguards;
Complaint and Impartial Due Process Hearing Procedures;
Evaluation and Determination of Educationally Handicapping Conditions;
Placement of Educationally Handicapped Students;
Confidentiality of Information;
Surrogate Parents.

(2) *Written Consent*
Informed, written consent shall be secured from the parent(s) prior to:

a. Conducting a pre-placement evaluation;

b. Individual evaluations administered for the purpose of further diagnosing an educationally handicapped student;

c. Initial placement of an educationally handicapped student in a program providing special education or special education and educationally related services;

d. Annual renewal of the educationally handicapped student's placement in a special education program;

e. Determining or changing the classification (Special Education Information System (SPEDIS) code);

f. Changing the nature or extent of the special education or special education and educationally related services.

(3) *Parental Refusal of Consent*

a. Parents of educationally handicapped students shall have fourteen (14) days to affix their signature on documents which request their signature. Local school districts are required to advise the parent(s) in writing of the necessity of signing such documents for the purpose of insuring the timely provision of appropriate educational services or, if they disagree, their right to access all of the rights and procedures outlined in the *Procedural Safeguards* Section of these Standards. These efforts should include the use of registered mail, documented telephone calls, and home visitations. The fourteen (14) day time limit may be extended if the Local Education Agency and parent(s) mutually agree to an extention.

b. If the parent(s) inform the district of their disagreement, or if they fail to make a decision within the specified time frame, it shall be interpreted as disagreement with the decision or action proposed by the local school district's Special Education Evaluation/Placement Team. If the Local Education Agency feels its action or decision should, in the best interests of the student, be implemented, the Local Education Agency shall initiate its right of due process as specified in the *Complaint and Impartial Due Process Hearing Procedures* Section of these *Standards* to obtain the authority to implement its decision.

* * *

CHAPTER ED 1127

COMPLAINT AND IMPARTIAL DUE PROCESS HEARING PROCEDURES

* * *

ED 1127.02 LOCAL EDUCATION AGENCY IMPARTIAL DUE PROCESS HEARING

The Local Education Agency shall provide procedures to insure that parents, legal guardians, surrogate parents, adult students, and the local school district have an opportunity to initiate an Impartial Due Process Hearing. At the time that this Process is initiated, the appealing party shall give to the other party written notice of the specific decision being appealed, the grounds for this appeal, and the remedy being requested.

(a) The Local Education Agency shall notify the Commissioner of Education and the local school board immediately upon receipt of a statement from the parent(s) that they wish to appeal a decision of the local school district regarding the identification, evaluation, Individual Education Program, provision of a free, appropriate public education, or placement of the student, or the parent signs Part B on the Consent page of the Annual Statement of Placement form as an official declaration of an appeal.

(b) The Commissioner of Education shall immediately schedule an Impartial Due Process Hearing at a time and place convenient to both parties but in no case later than forty-three (43) days after receipt of the notice by the Local Education Agency. The Commissioner of Education shall appoint an Impartial Due Process Hearing Officer to conconduct the Due Process Hearing.

* * *